SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 175

THE UNITED STATES OF AMERICA, PETITIONER

vs.

OLE BERKENESS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the District Court for the Territory of Alaska,
Fourth Judicial Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT RE APPEAL.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that this appeal is being made by the United States Government and that no money has been or will be paid therefor.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROBT. W. TAYLOR,
Clerk.
By Claire Stanfield,
Deputy.

NAMES OF ATTORNEYS OF RECORD.

JULIEN A. HURLEY, United States Attorney,
Attorney for Plaintiff.

No Attorney for Defendant.

In the District Court for the Territory of Alaska, Fourth Division.

No. 2758—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLE BERKNESS,

Defendant.

COMPLAINT.

COMES NOW the plaintiff above named and for cause of suit against the above-named defendant, complains and alleges:

I.

That plaintiff, United States of America, is a corporation sovereign and this suit is prosecuted in its name and on its behalf by Julien A. Hurley, United States Attorney for the Fourth Division of the Territory of Alaska, pursuant to authority thereto granted by Sections 19 and 20 of the Act of Congress approved February 14, 1917, commonly known as the Alaska Dry Law and by the Judicial Code of the United States and for the purpose of enjoining and abating a certain common and public nuisance as defined in said Section 19 and 20 of said Act and now existing on certain premises situated within the Fourth Division of the Territory of Alaska, more particularly described in that paragraph of this complaint, numbered and marked III.

II.

That this is a suit of a civil and equitable nature arising under the Constitution and laws of the United States, and jurisdiction is given thereof to this Honorable Court by said Sections 19 and 20 and by the Judicial Code of the United States.

III.

That the description of the premises (hereinafter referred to as "said premises"), upon which said common and public nuisance exists is as follows, to wit: That certain building located upon Lot 4 of Block 82, in the Town of Fairbanks, Territory and Division aforesaid.

IV.

That the said defendant is the owner of said premises, and [1*] on the 5th day of May, A. D. 1925, said defendant had in his possession at and in said premises intoxicating liquor, to wit, beer and wine, and was engaged therein, in manufacturing intoxicating liquor, to wit, beer, which said liquor was kept and stored in said premises and was being manufactured therein by said defendant, in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and particularly in violation of Sections 19 and 20 of said Act.

That said defendant has for a long time prior to the 5th day of May, 1925, kept and maintained said premises as a common and public nuisance, and

*Page number appearing at foot of page of original certified Transcript of Record.

has, during said time, kept intoxicating liquor in his possession, and stored in said premises.

That on the 5th day of May, A. D. 1925, the said defendant had in his possession at and in said premises the following contraband intoxicating liquor and property in violation of said Act of Congress, and particularly in violation of Sections 19 and 20 of said Act, to wit:

99 Full Bottles of Beer.
1 Sack Bottle Caps.
1 Copper Boiler.
1 50-Gal. Bbl. of Wine.
6 Cans Malt Syrup.
7 Pkgs of Hops.
11 Pounds of Caps.
1 50-Gal. Bbl. full of Beer Mash in the process of being manufactured.
1 Watch.
3 Feet Syphon Hose.
1 Beer Thermometer.
8 Glasses.
2 Spiggots.
1 Bottle Labeled "Certo"
1 Small Funnel.
1 Bottle Capper.
1 Bill File and Bills.
2 Calenders.
15 Pounds Sugar.
15 Pounds Cornmeal.
12 Pounds Figs.
1 Bunch Keys.
1 Large Funnel.

2 Pcs. Copper Pipe.
1 Sack Corks.
6 Bottles Liquid having an Odor of Garlic.
5 Sacks Used Hops.
1 50-Gal. Bbl. Empty.
1 100# Butter Bbl.
1 Lot Empty Bottles.
1 10-Gal. Keg Empty.
1 8-Gal. Still Complete.
1 Copper Bottom Wash Boiler.
1 50-Gal. Bbl. Cut down 1/3.
1 Lot Empty Bottles.

That on the 5th day of May, A. D. 1925, the said defendant [2] maintained and conducted a common and public nuisance on said premises in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and will continue to conduct said premises as a common and public nuisance unless restrained by this Honorable Court.

V.

That plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiff prays that this Honorable Court shall enter Judgment and Decree herein, directing and ordering that no intoxicating liquors shall be manufactured, kept or stored, in said premises, or any part thereof, and that said premises shall be perpetually closed and enjoined and that said defendant be perpetually enjoined from using the same as a nuisance, as defined in said

Sections 19 and 20 of the Alaska Dry Law and that said premises be closed and locked for the period of one (1) year; that such other relief be granted by this Court as is just and equitable under the law and facts of this case and that plaintiff have its costs and disbursements herein.

JULIEN A. HURLEY,

United States Attorney for the Fourth Division of the Territory of Alaska and Attorney for Plaintiff.

[Endorsed]: Filed May 6, 1925. [3]

United States of America,
Territory of Alaska,—ss.

I, Julien A. Hurley, being first duly sworn, upon oath depose and say:

That I am United States Attorney for the Fourth Division of the Territory of Alaska; that I appear for and represent the United States of America, the above-named plaintiff; that I have read the foregoing complaint, know the contents thereof and have signed the same in my own proper handwriting; that the allegations contained in said complaint are true as I verily believe.

JULIEN A. HURLEY.

Subscribed and sworn to before me this 6th day of May, A. D. 1925.

[Seal] M. O. CARLSON,
Notary Public for Alaska.

My commission expires April 15, 1928.

United States of America,
Territory of Alaska,—ss.

I, Julien A. Hurley, United States Attorney and attorney for plaintiff herein, hereby certify that the foregoing complaint is a true and correct copy and transcript of the original complaint on file herein of the whole thereof.

Dated at Fairbanks, Alaska, this ——day of May, A. D. 1925.

_____,
United States Attorney and Attorney for Plaintiff.

[4]

[Title of Court and Cause.]

ANSWER.

The defendant for answer to the complaint herein admits that he is the owner of Lot 4 of Block 82 in the Town of Fairbanks and the building located thereon but denies each and every other material allegation contained in paragraphs I, II, III, IV of said complaint.

WHEREFORE defendant having fully answered the complaint herein, prays that the plaintiff take nothing by said complaint and that the defendant have his costs and disbursements in this behalf expended.

OLE BIRKENES,
Defendant.

Service of the foregoing answer by receipt of a copy thereof is hereby acknowledged this 5th day of June, 1925.

JULIEN A. HURLEY,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 5, 1925. [5]

[Title of Cause.]

TRIAL BY THE COURT.

Now on this day this cause came on regularly for trial, the United States of America appearing by and through Julien A. Hurley, United States Attorney, the defendant being present and represented by Thomas A. Marquam, Esq., and both sides announcing themselves ready for trial, the following proceedings were had, to wit:

Thomas J. McCroskey, being first duly sworn, testified for and in behalf of the plaintiff.

Certified copy of affidavit by Thos. J. McCroskey for search-warrant was duly offered and marked as Plaintiff's Identification "A."

Certified copy of affidavit by D. W. Flanigan for search-warrant was duly offered and marked as Plaintiff's Identification "B."

Certified Copy of affidavit by H. E. Seneff for search-warrant was duly offered and marked as as Plaintiff's Identification "B."

Certified copy of search-warrant, inventory and marshal's return (attached) in this cause were

duly offered and marked as Plaintiff's Identification "D."

H. E. Seneff, being duly sworn testified for and in behalf of the plaintiff.

Plaintiff rests.

Defendant rests.

WHEREUPON, this cause being submitted without argument and the Court being fully and duly advised in the premises,—

IT IS ORDERED that this cause be and is hereby dismissed.

Entered in Court Journal No. 16, page 596.

April 1, 1926. [6]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on regularly for trial on Thursday, the first day of April, 1926, and the plaintiff, United States of America, appearing by Julien A. Hurley, United States Attorney, and the defendant appearing by T. A. Marquam, Esq., and the said Julien Hurley and the said T. A. Marquam announcing to the Court that they were then and there ready to proceed with the trial of this cause; whereupon testimony of witnesses, T. J. McCroskey and H. E. Seneff, and certain exhibits as documentary proof were offered in evidence on behalf of the plaintiff, objected to by defendant and excluded by the Court and the Court having con-

sidered the testimony so offered on behalf of the plaintiff and the petition for the suppression of evidence filed herein on behalf of the defendant, and being fully advised in the premises, makes and enters the following

FINDINGS OF FACT.

I.

That plaintiff has failed to show or prove or offer to prove by any competent or legal testimony that the defendant, Ole Berkeness, on the fifth day of May, 1925, or at any other time, was engaged in maintaining a public nuisance as defined in sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and as alleged in plaintiff's complaint on file herein.

II.

That defendant's petition for the suppression of evidence, [7] filed herein, was properly allowed by this Court and that the evidence secured under the search-warrant, offered in evidence in this case, was properly excluded by this Court.

Based upon the foregoing findings of fact the Court makes and enters the following

CONCLUSIONS OF LAW.

I.

That the equities are with the defendant in this suit.

II.

That defendant is entitled to the judgment and decree of this Court dismissing this suit.

Dated and signed at Fairbanks, Alaska, this 21st day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 615.
Filed May 21, 1926. [8]

In the District Court for the Territory of Alaska,
Fourth Division.

No. 2758—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OLE BERKENESS,
Defendant.

JUDGMENT AND DECREE.

Based upon the findings of fact and conclusions of law heretofore filed herein, and the Court being fully advised in the premises, WHEREFORE,

IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED, that plaintiff's suit herein be and the same is hereby dismissed.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that defendant recover of and from the plaintiff herein his costs and disbursements to be taxed.

Done in open court at Fairbanks, Alaska, this 21st day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 616.

[Endorsed]: Filed May 21, 1926. [9]

[Title of Court and Cause.]

NOTICE OF T. A. MARQUAM.

To Whom It may Concern:

Having performed the services for which I was employed in the above-entitled cause, my connection therewith has ceased and for that reason I am no longer attorney for the defendant in said action.

T. A. MARQUAM.

[Endorsed]: Filed May 21, 1926. [10]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on regularly for trial on Thursday, the 1st day of April, 1926, at the hour of 2:00 o'clock P. M., before the Hon. Cecil H. Clegg, the Judge of the above-entitled court; the plaintiff appearing by Julien A. Hurley, Esq., United States Attorney; and the defendant appearing by Thomas A. Marquam, Esq.; whereupon the following testimony was offered and proceedings had, to wit:

TESTIMONY OF T. J. McCROSKEY, FOR THE GOVERNMENT.

T. J. McCROSKEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Will you state your name?

A. T. J. McCroskey.

Q. What official position, Mr. McCroskey, did you hold, if any, in Fairbanks, in the Fourth Division, Territory of Alaska, on the 5th day of May, 1925?

A. Chief Deputy United States Marshal for the Fourth Division. [11]

Q. Had you been Chief Deputy United States Marshal for some time prior to that time?

A. I had; yes.

Q. And for some time after the 5th of May, 1925, were you Chief Deputy United States Marshal?

A. Until August 1st, last year.

Mr. HURLEY.—I would like to have this affidavit marked Plaintiff's Exhibit "A" for Identification.

The COURT.—Is that satisfactory to counsel?

Mr. MARQUAM.—For identification. What is the Clerk going to mark?

Mr. HURLEY.—A certified copy of one of the affidavits.

(Affidavit referred to marked Plaintiff's Exhibit "A" for Identification.)

Mr. HURLEY.—I will ask that this affidavit for

(Testimony of T. J. McCroskey.)

search-warrant be marked Plaintiff's Exhibit "B" for Identification, an affidavit of D. W. Flanigan.

(Affidavit referred to marked Plaintiff's Exhibit "B" for Identification.)

And this certified copy of an affidavit of H. E. Seneff be marked Plaintiff's Exhibit "C" for Identification.

(Affidavit referred to marked Plaintiff's Exhibit "C" for Identification.)

And this certified copy of search-warrant and Marshal's Return, I will ask that it be marked Plaintiff's Exhibit "D" for Identification.

(Document referred to marked Plaintiff's Exhibit "D" for Identification.)

Mr. MARQUAM.—What paper is that, please?

Mr. HURLEY.—Search-warrant and return. [12]

Mr. MARQUAM.—And three affidavits?

Mr. HURLEY.—McCroskey's, Flanigan's and Seneff's affidavits, and the search-warrant, together with the inventory and return, marked Plaintiff's Exhibit "D" for Identification.

Q. Mr. McCroskey, calling your attention to Plaintiff's Exhibit "A" for Identification, I will ask you to state, if you know, what that certified copy of affidavit is.

Mr. MARQUAM.—We object as incompetent. The instrument will speak for itself, I should think.

The COURT.—He may identify it.

A. It is an affidavit signed by myself on May 5th of last year.

(Testimony of T. J. McCroskey.)

Q. Before whom?

A. Before M. R. Boyd, Commissioner.

Mr. HURLEY.—We offer the certified copy of the affidavit for search-warrant signed by T. J. McCroskey and marked Plaintiff's Exhibit "A" for Identification in evidence as Plaintiff's Exhibit "A."

Mr. MARQUAM.—We object to it as incompetent. It has been shown in a case arising out of this same transaction that the search-warrant was void and it was so held by the Court. The evidence was suppressed as if it never existed. It can't be used for any purpose and we object to its introduction for that reason. It was stipulated in the presence of the Court in chambers, between counsel, so there would be no misunderstanding about that, that the ruling of the Court relative to the validity of the search-warrant in the case of United States vs. Ole Berkeness, being Criminal case No. 944, would apply in this case as in the criminal case. [13]

Mr. HURLEY.—My understanding was that the petition for the suppression of evidence could be considered in this case but I didn't agree that the ruling of the Court would apply in this case.

The COURT.—I recall that it was agreed to by the attorneys before the Court in chambers but, of course, that doesn't appear here in the record. I think you ought to consider the petition that was filed for the suppression of evidence in the case of United States vs. Ole Berkeness, Criminal Case No. 944, as part of this case.

(Testimony of T. J. McCroskey.)

Mr. MARQUAM.—That was the substance of our stipulation.

Mr. HURLEY.—I am willing to stipulate that the petition that was filed in Criminal case No. 944, United States vs. Ole Berkeness, petition for the suppression of evidence may be considered by the Court in this case.

The COURT.—So considering it, the Court will have to sustain the objection.

Mr. HURLEY.—We desire an exception.

The COURT.—Exception allowed.

Q. Calling your attention to the certified copy of affidavit for search-warrant signed by D. W. Flanigan and marked Plaintiff's Exhibit "B" for Identification, I will ask you to state, if you know, what that is.

A. That is an affidavit signed by D. W. Flanigan on the same date, May 5th of last year.

Q. And before whom?

A. M. R. Boyd, Commissioner.

Q. The United States Commissioner for Fairbanks Precinct? A. Yes, sir. [14]

Mr. HURLEY.—I offer—

The COURT.—(Interrupting.) If you want to preserve your record now you will have to make an offer of this affidavit I have excluded in order to get it in the record.

Mr. HURLEY.—I made an offer of the affidavit.

The COURT.—But it doesn't show what it is. You will have to read it into the record if you want to preserve the record, otherwise you have no record to go up on.

Mr. HURLEY.—I will ask permission, if the Court please, to read the affidavit in the record and offer it in evidence as Government's Exhibit "A," an affidavit for search-warrant by T. J. McCroskey. (Reading:)

GOVERNMENT'S EXHIBIT "A."

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska, —ss.

"I, T. J. McCroskey, being first duly sworn, upon oath depose and say:

"That I am a Deputy United States Marshal for the Fourth Division of the Territory of Alaska; that on the evening of the 4th day of May, 1925, I was within a short distance of that certain building located on Lot 4 of Block 82 and occupied and controlled by one Ole Berkeness and at said time I could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness, within said building;

"That on several occasions prior to the 4th day of May, 1925, I was within a very short distance of the building above described and could plainly smell the odor of intoxicating liquor and know that the same came from [15] liquor kept and stored by the said Ole Berkness in the building above described; that as a Deputy United States Marshal, I have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of the Commissioner of Fairbanks Precinct, Fourth Division, Territory of Alaska.

"In the District Court for the Territory of Alaska.
Fourth Judicial Division.

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Robt W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one pages of typewritten matter constitutes a full, true, and complete copy, and the whole thereof, of Affidavit of T. J. McCroskey for search-warrant in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

"In witness whereof, I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects for [16] the reason that the same is in-

competent under the stipulation between counsel that the Court may consider as filed in this case the motion for the suppression of evidence, which motion is supported by the affidavit of the defendant showing that the building for the search of which a search-warrant was asked was the residence of the defendant and occupied by him as such, and the Court having sustained that motion, the introduction in evidence of the affidavit for the issuance of the search-warrant is incompetent and objection is raised for that reason.

The COURT.—The objection will be sustained and the offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—We desire at this time to offer in evidence Government's Exhibit "B" for Identification, which is as follows: (Reading:)

GOVERNMENT'S EXHIBIT "B."

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska,—ss.

"I, D. W. Flanigan, being first duly sworn, upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That Ole Berkness has in his possession, in that certain building situated on Lot 4 of Block 82, of the Town of Fairbanks, Alaska, intoxicating liquor,

which is kept and stored in said building by the said Ole Berkness, in [17] violation of the provisions of the Alaska Dry Law;

"That on the 4th day of May, 1925, I was within 10 or 12 feet of the building above described and could plainly smell the odor of intoxicating liquor and know that the said odor came from the said intoxicating liquor within the building above described; that at said time I could plainly hear several people talking within said building;

"That on the 5th day of May, 1925, I was within a short distance of the above-described building and could plainly smell the odor of intoxicating liquor and know that said odor came from intoxicating liquor kept and stored by the said Ole Berkness within the above-described building; that at said time I heard loud talking within said building by several men such as would come from men who had been drinking.

"D. W. FLANIGAN.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of the Commissioner.

"In the District Court for the Territory of Alaska,
Fourth Judicial Division.

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one pages of typewritten matter, constitutes a full, true, and complete copy, and the whole thereof, of Affidavit [18] of D. W. Flanigan for search-warrant in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court. We offer this in evidence.

Mr. MARQUAM.—We object for the reason stated in the objection to the previous offer.

The COURT.—The objection will be sustained and the offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

(Testimony of T. J. McCroskey.)

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects as the same is incompetent for the reason stated in our objection to the first offer made.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. Calling your attention to Plaintiff's Exhibit "D" for Identification, certified copy of search-warrant, inventory and return, I will ask you to state what that is.

A. This is a copy of a search-warrant with the Marshal's return of search made of the Ole Berkeness establishment on May 5th last year.

Mr. HURLEY.—We offer this in evidence and desire to read it in the record as Government's Exhibit "D." (Reading:)

GOVERNMENT'S EXHIBIT "D."

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"SEARCH-WARRANT.

"In the Name of the United States of America, to G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska,

or Any of His Deputies and to Any Prohibition Agent for the Territory of Alaska, GREETING: [21]

"Information on oath having been this day laid before me by D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, H. E. Seneff, Prohibition Agent for the Territory of Alaska, and T. J. McCroskey, Deputy United States Marshal for the Fourth Division of Alaska, and affidavits having been subscribed and sworn to by the said D. W. Flanigan, H. E. Seneff, and T. J. McCroskey, before me, the undersigned, and filed in the above-entitled court, charging that Ole Berkness has in his possession and stored and kept by him in that certain building situated on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, intoxicating liquor and it appearing to the Court from the said affidavits that the said D. W. Flanigan, H. E. Seneff and T. J. McCroskey were within a short distance of said building on the 4th day of May, 1925, and that each of them could plainly smell the odor of intoxicating liquor from within said building and that the same came from intoxicating liquor kept and stored therein by the said Ole Berkness and that occasions before said 4th day of May, 1925, there was known to the said T. J. McCroskey, D. W. Flanigan and H. E. Seneff, that intoxicating liquor was being kept and stored in said building above described and the statements contained in said affidavits above referred to showing to this Court that intoxicating liquor is being kept and stored by the said Ole Berkness in the building above described, and the

Court being satisfied that liquor is kept and stored therein and existence of the grounds of the application for this search-warrant and finding that there is probable cause to believe that intoxicating liquor is kept and stored by the said Ole Berkness in the premises above described in violation of the provisions of the Act of Congress approved February 14th, 1917, commonly [22] known as the Alaska Dry Law.

"Now, therefore, you are hereby commanded at any time in the day or night to make immediate search of that certain building located on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, as above described, and all appurtenances, for intoxicating liquor and if you find any intoxicating liquor seize and take the same together with all containers and bring the same forthwith to me at my office in Fairbanks, Alaska, to be disposed of according to law.

"Wherefore, fail not and make due return of this writ, together with your affidavit showing delivery of a copy of this writ, a receipt for the property taken and an inventory of the same as required by law.

"Dated at Fairbanks, Alaska, this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of said Commissioner.

"Inventory of Property Seized from the Cabin of Ole Berkness.

"Cellar.

99 full bottles of beer.
1 sack bottle caps.
1 copper boiler.
1 50-gallon barrel of wine.

"Main Building.

6 cans malt syrup.
1 lot of empty bottles.
7 packages of hops.
11 pounds of caps.
1 50-gallon barrel full of beer mash.
1 watch.
3 feet *sa*phon hose.
1 beer thermometer.
8 glasses.
2 spiggots.
1 bottle labeled "Certo." [23]
1 small funnel.
1 bottle capper.
1 bill file and bills.
2 calenders.
15 pounds sugar.
15 pounds cornmeal.
12 pounds figs.
1 bunch keys.
1 large funnel.
2 pieces copper pipe.
1 sack corks.
6 bottles liquid having an odor of garlic.

"Yard.

5 sacks used hops.
1 50-gallon barrel empty.
1 100 pound butter barrel.
1 lot empty bottles.

"Cache.

1 10-gallon keg empty.
1 8-gallon still complete.
1 copper bottom wash-boiler.
1 50-gallon barrel cut down $\frac{1}{3}$.
1 lot empty bottles.

"Money.

"In Clothes-press.

Silver	$ 63 25	
Currency	1 00	

"In table drawer.

Dimes	1 30	
Nickles	80	$ 66 35

"In Cellar.

Gold 20s	40 00	
Currency 20s	100 00	
Currency 10s	40 00	
Currency 5s	15 00	195 00
		$261 35

1 Nugget Chain and charm.

"I, T. J. McCroskey, the officer by whom this search-warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant, on the 5th day of May, 1925.

Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 6th day of May, 1925.

"M. R. BOYD.

"U. S. Commissioner and *Ex-officio* Justice of the Peace."

And the seal of the Commissioner. [24]

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"United States of America,

"Territory of Alaska,—ss.

"MARSHAL'S RETURN ON SEARCH-WARRANT.

"I, G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, do hereby certify and return that I received the original search-warrant to which this return is attached, at Fairbanks, Alaska, on the 5th day of May, 1925, and thereafter, on the 5th day of May, 1925, I duly executed the same by serving upon and delivering to Ole Berkness, a true and correct copy of said search-warrant and by searching the building described in said search-warrant, located on Lot 4 in Block 82 of the Town of Fairbanks, Alaska, and by seizing and taking into my possession certain contraband intoxicating liquor and property, a list of which is hereto attached and made a part of this return.

"I further certify and return that after making

said search and seizing said property, I gave a receipt to the said Ole Berkness for the said property so taken into my possession, a copy of which said receipt is hereto attached and made a part of this return, and a copy of the inventory filed herein, and I also delivered to the said Ole Berkeness a copy of the inventory of the said seized contraband liquor and property.

"Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"G. B. STEVENS,
"United States Marshal.
"By John J. Buckley,
"Deputy."

"In the District Court for the Territory of Alaska, Fourth Division. [25]

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached five pages of typewritten matter, numbered from 1 to 5, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of search-warrant, inventory of property seized and Marshal's return on search-warrant, in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

(Testimony of T. J. McCroskey.)

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects as incompetent for the reasons stated in our objection to the first offer made.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. Mr. McCroskey, did you serve the search-warrant which has been offered in evidence and marked as Plaintiff's Exhibit "D" for Identification upon the plaintiff, Ole Berkness, on the 5th day of May, 1925?

Mr. MARQUAM.—Just a moment. We object as incompetent and irrelevant for the reason that the evidence under the search-warrant has been suppressed and that the search-warrant has been held by the [26] Court to be void and incompetent for any purpose.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—I would like to offer at this time to prove by this witness that on the 5th day of May, 1925, this witness, Mr. T. J. McCroskey, who was at that time Deputy United States Marshal for the Fourth Division, Territory of Alaska, served the

search-warrant, which has been offered in evidence, upon the defendant in this action and that he, together with H. E. Seneff, Prohibition officer, D. W. Flanigan, Federal Prohibition officer, searched the building located on Lot 4, Block 82 in the Town of Fairbanks, Fourth Division, Territory of Alaska, and that they found in this building located on Lot 4, Block 82, in the Town of Fairbanks, Alaska, in the possession of the defendant, Ole Berkeness, ninety-nine bottles of beer, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still complete, together with the other contraband property used in connection with the manufacture and possession of intoxicating liquor described in the complaint and as shown by the inventory attached to the search-warrant which was offered in evidence, and that the defendant, Ole Berkeness, at that time and for a long time prior thereto, had stored in the building referred to in the complaint and was engaged on the 5th day of May, 1925, in said building in manufacturing intoxicating liquor in violation of the provisions [27] of the Alaska Dry Law.

Mr. MARQUAM.—To which offer the defendant objects as incompetent and irrelevant, inasmuch as all evidence under the alleged search-warrant has been suppressed for the reason that the building which was searched was the defendant's dwelling and occupied by him as such, and, therefore, all evidence offered and which was obtained by, under or through the execution of the search-warrant is inadmissible and incompetent.

(Testimony of H. E. Seneff.)

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—That is all, Mr. McCroskey.

Mr. MARQUAM.—No cross-examination.

(Witness excused.)

TESTIMONY OF H. E. SENEFF, FOR THE GOVERNMENT.

H. E. SENEFF, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Your name is H. E. Seneff? A. Yes, sir.

Q. What official position, if any, do you hold in Alaska? A. Prohibition officer.

Q. And were you a prohibition officer for Alaska on the 4th and 5th days of May, 1925? A. I was.

Q. Where were you stationed at that time, Mr. Seneff? A. Fairbanks. [28]

Q. Calling your attention to Government's Exhibit "B" for Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if you signed this affidavit for search-warrant.

Mr. MARQUAM.—It seems to me that the affidavit having been marked for identification and offered and having been excluded by the Court, any further questions, even for identification, with

(Testimony of H. E. Seneff.)

reference to this exhibit are improper and we object to them for that reason.

The COURT.—I think I will sustain the objection. It is the same affidavit you have already offered?

Mr. HURLEY.—Yes, your Honor.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. I will ask you to state whether or not you assisted Mr. T. J. McCroskey, Deputy United States Marshal for the Fourth Division, Territory of Alaska, and Mr. D. W. Flanigan, Federal Prohibition Agent, in serving a search-warrant upon the defendant, Ole Berkeness, and in searching the cabin of the defendant, Ole Berkeness, located on Lot 4, Block 82 in the Town of Fairbanks, Alaska, on the 5th day of May, 1925.

Mr. MARQUAM.—We object to that for the reason that it is incompetent, irrelevant and immaterial inasmuch as the search-warrant was held to be void and all evidence concerning it or its execution is incompetent.

The COURT.—I think he may answer that.

A. Yes, sir.

Q. Calling your attention to Government's Exhibit "D" for [29] Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if this is the search-warrant you assisted in serving on the defendant Ole Berkeness at that time. A. Yes, sir, it is.

(Testimony of H. E. Seneff.)

Q. In searching the cabin of the defendant, Ole Berkeness, and in serving this search-warrant upon the defendant, Ole Berkeness, at that time, what did you find in the cabin, Mr. Seneff?

Mr. MARQUAM.—To which question we object for the reason that it is incompetent, the search-warrant being void and the evidence obtained under it having been excluded by the Court. The question is incompetent.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—I offer at this time to prove by this witness that he, together with T. J. McCroskey, Deputy United States Marshal, and D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, served the search-warrant marked Plaintiff's Exhibit "D" for Identification and which was offered in evidence and excluded by the Court, that he assisted in serving the search-warrant on Ole Berkeness on the 5th day of May, 1925, and searched the cabin of the defendant, Ole Berkeness, located on Lot 4, Block 82, in the Town of Fairbanks, Alaska, and that in this cabin he found ninety-nine full bottles of beer in the possession of the defendant, Ole Berkeness, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being [30] manufactured, one eight-gallon still complete, together with the other contraband property listed and described in the complaint on file in this action, and that the

defendant, Ole Berkeness, was in possession of the cabin and engaged therein in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law, and had stored in this cabin in his possession a large quantity of intoxicating liquor that had been stored there for some time, and that Ole Berkeness was engaged therein in maintaining a common and public nuisance as defined in Sections 19 and 20 of the Act of Congress approved February 14th, 1917, commonly known as the Alaska Dry Law.

Mr. MARQUAM.—To which offer the defendant objects as incompetent for the reason that it calls for the evidence alleged to have been procured in the execution of a void search-warrant, all evidence obtained under which has been excluded by the Court, and for the further reason that the offer proposes to prove conclusions of law as distinguished from facts.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—That is all, Mr. Scheff.

Mr. MARQUAM.—No cross-examination.

(Witness excused.)

Mr. HURLEY.—I would like to ask at this time that a copy of the petition for the suppression of evidence, which it was stipulated between counsel for the defendant, Mr. [31] Marquam, and myself, could be considered in this case, which was filed in the Criminal case entitled "United States

of America, Plaintiff, vs. Ole Berkeness," No. 944, may be copied in the record in this case in connection with the stipulation showing what the petition for the suppression of evidence was so we can have a record of it in this case.

Mr. MARQUAM.—I was going to make the same request so it would be clear as to what the situation was and that the ruling of the Court upon it in sustaining the motion would be shown by the record as having been made prior to the hearing.

The COURT.—Very well.

Mr. HURLEY.—I will furnish a copy of the original petition that was filed in the criminal case to the reporter so it can be copied in this record.

"In the District Court, Territory of Alaska, Fourth Division.

"No. 944—CRIMINAL.

"UNITED STATES OF AMERICA,
Plaintiff.

vs.

"OLE BERKENESS,
Defendant.

"PETITION FOR THE SUPPRESSION OF EVIDENCE.

"Comes now the defendant, Ole Berkeness, and by this petition shows that upon the 5th day of May, 1925, and prior thereto he was a resident of the town of Fairbanks, Alaska, and resided in that certain building located on Lot 4 Block 82 in the said town

of Fairbanks, which building is referred to in the indictment herein. [32]

"That said building situate upon said lot was at said time, to wit: upon the 5th day of May, 1925, and for a long time prior thereto and at all times since said date has been and is to-day the defendant's private dwelling and occupied by him as such.

"That on the 5th day of May, 1925, E. H. Seneff, W. D. Flanigan and T. J. McCroskey made affidavits before R. M. Boyd, United States Commissioner for the Fairbanks Precinct and filed the same with said Commissioner, which affidavits purport to show that intoxicating liquor was kept and stored by the said Ole Berkeness in the building above described, in violation of the Alaska Dry Law.

"That said affidavits were prepared, signed and filed with said Commissioner for the purpose of securing a search warrant for the search of said building, that copies of said affidavits are hereto attached, marked Exhibits 'A,' 'B,' and 'C,' and made part of this petition.

"That upon the strength of said affidavits and by reason thereof said R. M. Boyd, as United States Commissioner, did upon the 5th day of May, 1925, issue a search warrant directed to G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, or any of his deputies, and to any prohibition agent for the Territory of Alaska directing them to search said building at any time in the day or night for intoxicating liquors and if any were found to dispose of the same according to law.

"That a copy of said search warrant is hereto attached, marked Exhibit 'D' and made part of this petition.

"That in compliance with the directing of said search warrant the said United States Marshal, by and through his deputy, T. J. McCroskey, executed said search warrant [33] with the assistance of the said D. W. Flanigan, H. E. Seneff and B. F. Thompson against the protests of the defendant, by searching defendant's private dwelling aforesaid.

"That as a result of said search certain articles and personal property were seized, an inventory of which is shown by the return of the United States Marshal on said search warrant and a copy of which return is attached, marked Exhibit 'E' and made part of this petition.

"That said transactions were had and certain acts performed, as is shown by the indictment herein, and as a result of which the indictment herein was returned by the Grand Jury.

"That the said search warrant issued by said United States Commissioner was unlawful and void and known to the said United States Marshal and his deputy, at the time of its issuance and execution to be unlawful and void and that the issuance and service of said search warrant violates all the constitutional rights of the defendant herein, all of which was known to the United States Marshal and his deputy at the time of the issuance and execution of the same, for the reason that it was not shown by the affidavits upon which said search warrant was based, nor does it appear upon the face of said

search warrant, that said building was occupied by the defendant as his dwelling, and was being used as a place of sale of intoxicating liquors.

"Wherefore, petitioner prays that all evidence of whatsoever nature gained by said United States Marshal or his deputy or any person or persons acting with, through, or under him in the unlawful search of said dwelling of defendant be suppressed, and that they and each of them be [34] restrained from using any information or evidence obtained by said unlawful search or in connection therewith, against this defendant in this case or otherwise.

"OLE BIRKENES,
"Petitioner.

"United States of America,
"Territory of Alaska,
"Fairbanks Precinct,—ss.

"Ole Berkeness being first duly sworn on oath deposes and says: That he is the defendant in the above-entitled action, that he has read the foregoing petition, knows the contents thereof and that the same is true as he verily believes.

"OLE BIRKENES.

"Subscribed and sworn to before me this 17th day of March, 1926.

"T. A. MARQUAM,
"Notary Public for Alaska.

"My commission expires March 20th, 1927."

Notarial seal of T. A. Marquam attached.

"Service of the foregoing by receipt of a copy thereof is hereby acknowledged this 19 day of March, 1926.

"JULIEN A. HURLEY,
"Attorney for Plaintiff."

"EXHIBIT 'A.'

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,
"Territory of Alaska.—ss.

"I, H. E. Seneff, being first duly sworn upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That on the evening of the 4th day of May, 1925, I was within about 50 feet of that certain building located on [35] Lot 4 of Block 82 in the Town of Fairbanks, Alaska, and could plainly smell the odor of intoxicating liquor and know that the same came from intoxicating liquor kept and stored therein by Ole Berkness, who is in possession and has the control of said building;

"That on the 3d day of May, 1925, I saw about 10 or 15 men going in and coming out of the above described building and on different and numerous occasions prior to the 3d day of May, 1925, I was within 10 or 12 feet of said building and could plainly smell the odor of intoxicating liquor from therein and know that said odor came from liquor

kept and stored by the said Ole Berkness in the building above described.

"H. E. SENEFF.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal] A. M. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'B.'

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska,—ss.

"I, D. W. Flanigan, being first duly sworn upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That Ole Berkness has in his possession, in that certain building, situated on Lot 4 Block 82, of the Town of Fairbanks, Alaska, intoxicating liquor, which is kept and stored in said building by the said Ole Berkness, in violation [36] of the provisions of the Alaska Dry Law;

"That on the 4th day of May, 1925, I was within 10 or 12 feet of the building above described and could plainly smell the odor of intoxicating liquor and know that the said odor came from the said intoxicating liquor within the building above described; that at said time I could plainly hear several people talking within said building;

"That on the 3rd day of May, 1925, I was within a short distance of the above described building and could plainly smell the odor of intoxicating liquor and know that said odor came from intoxicating liquor kept and stored by the said Ole Berkness within the above described building; that at said time I heard loud talking within said building by several men such as would come from men who had been drinking.

"D. W. FLANIGAN.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal.] M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'C.'

"United States of America,

"Territory of Alaska,—ss.

"I, T. J. McCroskey, being first duly sworn upon oath depose and say:

"That I am a Deputy United States Marshal for the Fourth Division of the Territory of Alaska; that on the evening of the 4th day of May, 1925, I was within a short distance of that certain building located on Lot 4 of Block 82 and occupied and controlled by one Ole Berkness [37] and at said time I could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness, within said building;

"That on several occasions prior to the 4th day of May, 1925, I was within a very short distance of the building above described and could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness in the building above described; that as a Deputy United States Marshal, I have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal] R. M. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'D.'

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"No. 1396.

"SEARCH-WARRANT.

"In the Name of the United States of America: To G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, or Any of His Deputies and to Any Prohibition agent for the Territory of Alaska, GREETING:

"Information on oath having been this day laid before me by D. W. Flanigan, Federal Prohibition

Agent for the Territory of Alaska, H. E. Seneff, Prohibition Agent for the Territory of Alaska and T. J. McCroskey, Deputy United States Marshal for the Fourth Division of Alaska, and affidavits [38] having been subscribed and sworn to by the said D. W. Flanigan, H. E. Seneff, and T. J. McCroskey, before me, the undersigned, and filed in the above entitled Court, charging that Ole Berkness has in his possession and stored and kept by him in that certain building situated on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, intoxicating liquor and it appearing to the Court from the said affidavits that the said D. W. Flanigan, H. E. Seneff and T. J. McCroskey were within a short distance of said building on the 4th day of May, 1925, and that each of them could plainly smell the odor of intoxicating liquor from within said building and that the same came from intoxicating liquor kept and stored therein by the said Ole Berkness and that occasions before said 4th day of May, 1925, there was known to the said T. J. McCroskey, D. W. Flanigan and H. E. Seneff, that intoxicating liquor was being kept and stored in said building above described and the statements contained in said affidavits above referred to showing to this Court that intoxicating liquor is being kept and stored by the said Ole Berkness in the building above described, and the Court being satisfied that liquor is kept and stored therein and existence of the grounds of the application for this search-warrant and finding that there is probable cause to believe that intoxicating liquor is kept and

stored by the said Ole Berkness in the premises above described in violation of the provisions of the Act of Congress approved February 14th, 1917, commonly known as the Alaska Dry Law.

"Now, therefore, you are hereby commanded at any time in the day or night to make immediate search of that certain building located on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, as above described and all appurtenances, [39] for intoxicating liquor and if you find any intoxicating liquor seize and take the same together with all containers and bring the same forthwith to me at *any* office in Fairbanks, Alaska, to be disposed of according to law.

"Wherefore, fail not and make due return of this writ, together with your affidavit showing delivery of a copy of this writ, a receipt for the property taken and an inventory of the same as required by law.

"Dated at Fairbanks, Alaska, this 5th day of May, A. D. 1925.

"[Seal] M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'E.'

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"United States of America,
"Territory of Alaska,—ss.

"MARSHAL'S RETURN ON SEARCH-WARRANT.

"I, G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, do hereby certify and return that I received the original search-warrant to which this return is attached, at Fairbanks, Alaska, on the 5th day of May, 1925, and thereafter, on the 5th day of May, 1925, I duly executed the same by serving upon and delivering to Ole Berkness, a true and correct copy of said Search Warrant and by searching the building described in said Search Warrant, located on Lot 4 in Block 82 of the Town of Fairbanks, Alaska and by seizing and taking into my possession certain contraband intoxicating liquor and property, a list of which is hereto attached and made a part of this Return. [40]

"I further certify and return that after making said search and seizing said property, I gave a receipt to the said Ole Berkenes for the said property so taken into my possession, a copy of which said receipt is hereto attached and made a part of this Return, and a copy of the Inventory filed

herein, and I also delivered to the said Ole Berkenes, a copy of the Inventory of the said seized contraband liquor and property.

"Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"G. B. STEVENS,
"United States Marshal.
"By John J. Buckley,
"Deputy."

"Inventory of Property Seized from the Cabin of Ole Berkness.

"Cellar.

99 full bots. of beer.
1 sack bottle caps.
1 copper boiler.
1 50-gal. bbl. of wine.

"Main Building.

6 cans malt syrup.
1 lot of empty bottles.
7 pkgs. of hops.
11 pounds of caps.
1 50-gal. bbl. full of beer mash.
1 watch.
3 feet syphon hose.
1 beer thermometer.
8 glasses.
2 spiggots.
1 bot. labeled 'Certo.'
1 small funnel.
1 bot. capper.
1 bill file and bills.

2 calenders.
15 pounds sugar.
15 " cornmeal.
12 " figs.
1 bunch keys.
1 large funnel.
2 pcs. copper pipe.
1 sack corks.
6 bots. liquid having an odor of garlic.

"Yard.

5 sacks used hops.
1 50-gal. bbl. empty. [41]
1 100# butter bbl.
1 lot empty bottles.

"Cache.

1 10-gal keg empty.
1 8-gal still complete.
1 copper bottom wash-boiler.
1 50-gal. bbl. cut down 1/3.
1 lot empty bottles.

"Money.

In clothes-Press.

Silver	63.25	
Currency	1.00	
In table drawer.		
Dimes	1.30	
Nickles	.80	
		$ 66.35

"In Cellar.

Gold	20s	40.00	
Currency	20s	100.00	
	10s	40.00	
	5s	15.00	195.00
			$261.35

1 Nugget chain and charm."

Mr. HURLEY.—The plaintiff rests.

Mr. MARQUAM.—The defendant rests.

The COURT.—The case may be dismissed.

Mr. HURLEY.—We desire an exception to the ruling of the Court in dismissing the case.

The COURT.—Exception allowed. [42]

That thereafter and on the 21st day of May, 1926, findings of fact, conclusions of law and a decree were submitted to the Court and at the same time the plaintiff filed its objections to said findings of fact, conclusions of law and decree in words and figures, to wit: [43]

[Title of Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

Comes now the plaintiff above named by its attorney, Julien A. Hurley, United States Attorney, and respectfully objects to the findings of fact, conclusions of law and decree submitted herein which are in favor of the above-named defendant and against the plaintiff for the reasons hereinafter contained as follows:

1. Plaintiff objects to findings of fact numbered I for the reason that the plaintiff herein offered to prove by the competent evidence of two witnesses that the defendant, Ole Berkeness, on the 5th day of May, 1925, had stored in that certain building situated on lot 4 of block 82, in the town of Fairbanks, Alaska, beer, wine and other intoxicating liquor and that said defendant had in his possession in said building, in addition to said liquors a still and paraphernalia used on connection with the storing and manufacturing of intoxicating liquor and that said defendant was then, and for a long time prior thereto had been, engaged in manufacturing liquor in said premises in violation of the provisions of Sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law.

2. Plaintiff objects to finding of fact numbered II for the reason that the affidavits for search-warrant and the search-warrant, offered in evidence by plaintiff and excluded by the Court, were legal and valid and in conformity with the provisions of the Alaska Dry Law and for the further reasons [44] that the petition for the suppression of the evidence, filed herein by defendant is not based upon the provisions of the Alaska Dry Law but upon the provisions of the National Prohibition Act which is not applicable to this suit and said petition should be overruled and disregarded by the Court.

3. Plaintiff objects to conclusions of law numbered I and II for the reasons that said conclusions

are in violation of the law of this suit, against the rights of the plaintiff and based upon erroneous findings of fact.

4. Plaintiff objects to the judgment and decree for the reason that the same is based upon erronous findings of fact and conclusions of law and for the further reason that it is in violation of the law of this suit and against the rights of the plaintiff.

Dated at Fairbanks, Alaska, this 21st day of May, 1926.

JULIEN A. HURLEY,
United States Attorney.

The foregoing objections having been duly considered are hereby disallowed and exception allowed as to each.

CECIL H. CLEGG,
District Judge. [45]

That the Court thereupon overruled plaintiff's objections to said proposed findings of fact and conclusions of law and decree, to which ruling of the Court plaintiff then and there excepted and said exception was allowed by the Court.

That thereafter and on the same day the Court duly made and signed said findings of fact, conclusions of law and decree, to all of which findings of fact, conclusions of law and decree plaintiff had theretofore objected, as hereinabove set forth, plaintiff then and there excepted to the rulings of the Court and the exceptions were duly allowed by the Court.

JULIEN A. HURLEY,
United States Attorney. [46]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 24th day of May, 1926, the plaintiff, United States of America, presented the foregoing bill of exceptions to the Court for settlement, which said bill of exceptions was served and filed within the time allowed by the orders of the Court, and the defendant having waived objections to said proposed bill of exceptions and it appearing to the Court, on examination of the proposed bill of exceptions, that it contains a full, true and correct record of the proceedings in connection with said matter and that the same is true and correct in all particulars, and contains all the material testimony, evidence, exhibits and other proofs offered or introduced by the respective parties during the hearing of said cause and the Court being fully advised in the premises, Now, therefore, upon motion, it is ordered that the foregoing proposed bill of exceptions be, and the same is, hereby approved, allowed and settled as the bill of exceptions in the above-entitled cause and made a part of the record herein, and that the same has been filed and presented within the time allowed by the rules and order of the Court, and that the Clerk of the court shall file said bill of exceptions as of this date.

Done at Fairbanks, Alaska, in open court, this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge. [47]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

Now on this 24th day of May, 1926, comes the above-named plaintiff, United States of America, by Julien A. Hurley, United States Attorney, and E. B. Collins, Assistant United States Attorney, and says that the decree entered in said cause on the 21st day of May, 1926, is erroneous and against the just rights of said plaintiff, for the following reasons, to wit:

I.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "A" for Identification, the same being the affidavit of T. J. McCroskey for a search-warrant.

II.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "B" for Identification, the same being the affidavit of D. W. Flanigan for a search-warrant.

III.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "C" for Identification, the same being the affidavit of H. C. Seneff for a search-warrant.

IV.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "D" for Identification, the same being the

search-warrant signed and issued by M. R. Boyd, United States Commissioner, and served upon the [48] defendant in this suit.

V.

The Court erred in sustaining defendant's objection to the question propounded to plaintiff's witness, T. J. McCroskey, as follows:

> "Q. Mr. McCroskey, did you serve the search-warrant which has been offered in evidence and marked as Plaintiff's Exhibit 'D' for Identification, upon the defendant, Ole Berkeness, on the 5th day of May, 1925"?

VI.

The Court erred in sustaining defendant's objection to the offer of plaintiff to prove by plaintiff's witness, T. J. McCroskey, the following:

> "Mr. HURLEY.—I would like to offer at this time to prove by this witness that on the 5th day of May, 1925, this witness, Mr. T. J. McCroskey, who was at that time Deputy United States Marshal for the Fourth Division, Territory of Alaska, served the search-warrant, which has been offered in evidence, upon the defendant in this action and that he, together with H. E. Seneff, Prohibition Officer, D. W. Flanigan, Federal Prohibition Officer, searched the building located on lot 4, block 82 in the Town of Fairbanks, Fourth Division, Territory of Alaska, and that they found in this building located on lot 4, block 82, in the Town of Fairbanks, Alaska, in the possession of the defendant, Ole Berkeness, ninety-nine bottles

of beer, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still complete, together with the other contraband property used in connection with the manufacture and possession of intoxicating liquor, described in the complaint and as shown by the inventory attached to the search-warrant which was offered in evidence, and that the defendant, Ole Berkeness, at that time, and for a long time prior thereto, had stored in the building referred to in the complaint and was engaged, on the 5th day of May, 1925, in said building, in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law."

VII.

The Court erred in sustaining the objection made by defendant [49] to the question propounded to plaintiff's witness, H. E. Seneff, as follows:

"Q. Calling your attention to Government's Exhibit 'B' for Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if you signed this affidavit for search-warrant."

VIII.

The Court erred in sustaining defendant's objection to the question propounded to the plaintiff's witness, H. E. Seneff, as follows:

"Q. In searching the cabin of the defendant, Ole Berkeness, and in serving this search-warrant upon the defendant, Ole Berkeness,

at that time, what did you find in the cabin, Mr. Seneff?"

IX.

The Court erred in sustaining defendant's objection to plaintiff's offer to prove by plaintiff's witness, H. E. Seneff, the following:

"Mr. HURLEY.—I offer at this time to prove by this witness that he, together with T. J. McCroskey, Deputy United States Marshal, D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, served the search-warrant, marked Plaintiff's Exhibit 'D' for Identification and which was offered in evidence and excluded by the Court, that he assisted in serving the search-warrant on Ole Berkeness on the 5th day of May, 1925, and searched the cabin of the defendant, Ole Berkeness, located on lot 4, block 82, in the Town of Fairbanks, Alaska, and that in this cabin he found ninety-nine full bottles of beer in the possession of the defendant, Ole Berkeness, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still, complete, together with the other contraband property listed and described in the complaint on file in this action, and that the defendant, Ole Berkeness, was in possession of the cabin and engaged therein in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law and had stored in this cabin in his possession a large quantity of intoxicating li-

quor that had been stored there for some time, and that Ole Berkeness was engaged therein in [50] maintaining a common and public nuisance as defined in sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law."

X.

The Court erred in dismissing this case.

XI.

The Court erred in overruling the objections, filed by plaintiff, to the findings of fact, conclusions of law and the decree, entered herein.

XII.

The Court erred in entering a judgment and decree in favor of the defendant and against the rights of the plaintiff.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.

[Endorsed]: Filed May 24, 1926. [51]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now on the 24th day of May, 1926, this cause coming on regularly to be heard upon the petition of the plaintiff, United States of America, for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that said plaintiff's appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is hereby, allowed and said plaintiff shall not be required to give or execute a cost bond on appeal.

Done in open court this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 617.

[Indorsed]: Filed May 24, 1926. [52]

[Title of Court and Cause.]

DESIGNATION OF PLACE FOR HEARING ON APPEAL.

To the Honorable CECIL H. CLEGG, Judge of the Above-named Court, and to the Defendant, Ole Berkeness:

Comes now the appellant and pursuant to provision of the Act of Congress allowing appellant to designate the place of hearing of appeals does hereby designate the City and County of San Francisco, State of California, as the place of the hearing of the appeal in the above-entitled suit.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.

[Endorsed]: Filed May 24, 1926. [53]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Robert W. Taylor, Clerk of the Above-entitled Court:

You will please prepart transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, upon the appeal heretofore perfected to said Court, and will include in said transcript the following papers and records, to wit:

1. Complaint.
2. Answer.
3. Journal entry showing trial by Court.
4. Findings of fact and conclusions of law.
5. Judgment and decree.
6. Notice of T. A. Marquam that he is no longer attorney in this case.
7. Bill of exceptions.
8. Order settling bill of exceptions.
9. Assignment of error.
10. Petitions for appeal.
11. Order allowing appeal.
12. Citation on appeal.
13. Designation of place for hearing.
14. Order extending time within which to perfect appeal.
15. Praecipe for transcript.
16. Affidavit of service. [54]

This transcript to be prepared as required by law and the orders and rules of this court and of

the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the 14th day of August, 1926, pursuant to order of this Court extending time.

Fairbanks, Alaska, this 24th day of May, 1926.

JULIEN A. HURLEY,
United States Attorney,
E. B. COLLINS,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed May 24, 1926. [55]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

United States of America,
Territory of Alaska.—ss.

I, Julien A. Hurley, being first duly sworn upon oath depose and say: That on the 21st day of May, 1926, T. A. Marquam, Esq., filed a notice in the above-entitled cause to the effect that he had withdrawn as attorney for defendant and was no longer attorney in said suit; that on the said 21st day of May, 1926, the said T. A. Marquam refused to accept service or to receive a copy of the bill of exceptions filed herein; that on the 22d day of May, 1926, in Fairbanks, Alaska, I duly served the bill of exceptions, order settling bill of exceptions,

assignment of error, petition for appeal, order allowing appeal, citation on appeal, designation of place for hearing, order extending time within which to perfect appeal and the praecipe for transcript by delivering full, true and correct copies thereof to the above-named defendant, Ole Berkeness, personally, as the same appear upon the record in the above-entitled cause; that the said defendant received and accepted said copies as above stated but then and there refused to admit service of the same in writing; that I am United States Attorney for the Fourth Division of the Territory of Alaska and attorney for the above-named plaintiff in this suit.

JULIEN A. HURLEY,
United States Attorney. [56]

Subscribed and sworn to before me this 24th day of May, 1926.

[Seal] ROBT W. TAYLOR,
Clerk District Court, for the District of Alaska, Fourth Division.

[Endorsed]: Filed May 24, 1926. [57]

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached fifty-seven pages of typewritten matter, numbered from 1 to 57, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of Transcript of Record of Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkeness, Defendant, as listed on the General Index attached, as the same appears on file and of record in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROB'T W. TAYLOR,
Clerk.

By Claire Stanfield.
Deputy. [58]

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.

CITATION ON APPEAL.

The President of the United States of America, To the Above-named Appellee, Ole Berkeness, GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which the United States of America is the plaintiff and appellant and Ole Berkeness is the defendant and appellee, to show cause, if any there be, why the decree and order made and entered in said suit on the 21st day of May, 1926, as in said order allowing appeal is mentioned, should not be set aside and reversed, and why speedy justice should not be done to said appellant above named in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, on this 24th day of May, 1926, and the year of our Independence the one hundred and fiftieth.

Attest my hand and the seal of the above-named court this 24th day of May, 1926.

[Seal] CECIL H. CLEGG,
District Judge.

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Robt. W. Taylor, Clerk. By Claire Stanfield, Deputy.

PETITION FOR APPEAL.

The plaintiff, United States of America, considering itself aggrieved by the decree made and entered on the 21st day of May, 1926, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of error, which is filed herewith; and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.
Attorneys for Plaintiff.

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 14, 1926, WITHIN WHICH TO PERFECT APPEAL.

On this day the above-entitled cause came on to be heard before the Judge of the above-named court, on application of the plaintiff, United States of America, for an order extending the time within which to perfect its appeal herein; and no objections appearing and good cause being shown, and it appearing to the satisfaction of the Court that the thirty (30) days time allowed in the citation on appeal within which appellant should prepare and file his record herein with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is insufficient for said purpose, now, therefore,

IT IS ORDERED that the time within which said appellant shall perfect said cause on appeal and docket and file the record thereof in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby enlarged and extended to and including the 14th day of August, 1926.

Done in open court this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 617.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO ORIGINAL PAPERS.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached three pages of typewritten matter, numbered from 1 to 3, inclusive, constitute the original papers in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as follows:

Citation on appeal.

Petition for appeal.

Order extending time within which to perfect appeal.

Duplicate copies are retained in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROB'T W. TAYLOR,
Clerk.

By Claire Stanfield,
Deputy.

[Endorsed]: No. 4901. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ole Berkeness, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed July 6, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

69–70 [Minute entry of submission, Nov. 8, 1926, omitted in printing.]

71 **United States Circuit Court of Appeals**

UNITED STATES OF AMERICA, APPELLANT vs. OLE BERKENESS, APPELLEE	No. 4901

Order directing filing of opinion and filing and recording of decree

Filed Nov. 15, 1926

By direction of the honorable William B. Gilbert and Frank H. Rudkin, Circuit Judges, and William P. James, District Judge, before whom the above cause was heard, ORDERED that the typewritten opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion.

72 In the United States Circuit Court of Appeals

[Title omitted.]

Opinion

Filed Nov. 13, 1926

Before GILBERT and RUDKIN, Circuit Judges, and JAMES, District Judge

JAMES, District Judge:

This appeal, taken by the United States, presents the question as to whether a search warrant may be issued under the provisions
73 of the bone-dry act, affecting only Alaska Territory, where the place to be searched is used as a dwelling, without a showing first made under oath that intoxicating liquor is being sold therein. The national prohibition act, (sec. 25, Title II), requires such evidence to be presented before a search warrant shall issue.

The action was one authorized to be brought under the Alaska dry act, which declares any place to be a nuisance where alcoholic liquors are "manufactured, stored, sold, or vended, given away or vended contrary to law." (Secs. 19, 20, 39 Stats. 903.) The district judge sustained a preliminary motion of appellee to exclude evidence as to liquor found in a cabin occupied by appellee on the ground that such evidence was illegally secured. Rulings followed sustaining objections to the offer made by the district attorney to show that the liquor seized as evidence was taken under a search warrant issued upon the sworn statements of witnesses. The affidavits were sufficient in their statement of facts to justify the terms of the Alaska

prohibition act and to justify the issuance of the search warrant. (Sec. 17, act above cited.) That the national prohibition act did not work a repeal of the prohibition law, made specially for Alaska, has been decided in several cases in this circuit. (Abbate v. United States, 270 Fed. 735; Simpson v. United States, 290 Fed. 763; Peterson v. United States, 297 Fed. 1000.) In the Peterson case the conclusion of the court was thus summed up (p. 1001):

"The two laws, national prohibition act and Alaska dry law, are in force in Alaska, with the qualification that if there are in-
74 consistencies in any of their provisions the national prohibition act must prevail."

The inconsistency which will nullify the law applicable to the local Territory must be one concerned with the main purpose of the national act, so that its effect upon a right conferred or restriction declared will be to diminish or relax either. Intoxicating liquor, by permit, may be possessed under the terms of either act for certain purposes. Under neither act may intoxicating liquor be otherwise possessed. So it will not do to adopt the argument of counsel for the Government that the search-warrant provisions of the national prohibition act have to do with conditions different and inapplicable to the enforcement of the Alaska dry law. The purpose, as we here conceive it to be, of Congress when it adopted the national prohibition act and provided particularly what the conditions to a search of a private dwelling should be, was to occupy that ground fully and to the exclusion of laws of such local effect as that here considered. So acting, it impressed a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States.

The decree of dismissal is affirmed.

[File endorsement omitted.]

75 United States Circuit Court of Appeals

[Title omitted.]

Decree

Filed Nov. 15, 1926

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Territory of Alaska, *Fourther* Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the judgment of dismissal of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

76 United States Circuit Court of Appeals

[Title omitted.]

Order staying issuance of mandate

Filed Dec. 8, 1926

Upon consideration of the application by telegram of Mr. Julien Hurley, United States attorney, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate under rule 32 of this court be, and hereby is, stayed until January 18, 1927.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated: SAN FRANCISCO, CALIFORNIA, *December 8, 1926.*

[File endorsement omitted.]

77 [Clerk's certificate to foregoing transcript omitted in printing.]

78 Supreme Court of the United States

Order allowing certiorari

Filed April 18, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLE BERKENESS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit (R. 71) entered in the above-entitled cause affirming the decree of the United States District Court for the Fourth Division of Alaska. (R. 11.)

QUESTION PRESENTED

Has Section 17 of the Alaska Dry Law, in so far as it relates to the issuance of search warrants for private dwellings, been repealed or superseded by the search warrant provisions of Section 25, Title II, of the National Prohibition Act?

STATEMENT

This suit was brought in the District Court for the Fourth Division of Alaska to abate a common and public nuisance maintained in respondent's dwelling at Fairbanks, Alaska, in violation of Sections 19 and 20 of the Act of February 14, 1917, c. 53, 39 Stat. 903, 907, commonly known as the Alaska Bone Dry Law.

A search warrant was issued for the search of a building occupied by respondent at Fairbanks, Alaska, and for the seizure of any liquor found therein. (R. 24.) The warrant was based on three affidavits stating that intoxicating liquor was kept and stored in the building. (R. 17–22.) The warrant was served by the United States Marshal, who found in respondent's possession on the premises described a large quantity of intoxicating liquor, liquor in the process of being manufactured, a still, and other apparatus used in the manufacture of intoxicating liquor. (R. 27, 28.)

At the trial the Government offered testimony relating to the search and seizure and sought to introduce in evidence the search warrant, the supporting affidavits, and the Marshal's return thereon. Respondent objected and submitted a petition for the suppression of the evidence, which had previously been filed in the criminal case (R. 37), upon the grounds that the building in question was occupied by respondent as his residence and, inasmuch as the search warrant and supporting affi-

davits did not show that the building was being used as a place for the sale of intoxicating liquor, the warrant was void (R. 19, 32, 39, 40).

The affidavits, the search warrant, and the complaint in the suit were all prepared and filed under the provisions of the Alaska Dry Law, and it was the Government's contention that the warrant was valid because under the local law it was unnecessary to allege or show in the affidavits for the warrant that the building described was being used for the sale of intoxicating liquor. (R. 51.)

The petition for the suppression of evidence was granted, the evidence offered by the Government excluded, and the suit dismissed. (R. 11.)

An appeal was taken by the Government to the Circuit Court of Appeals for the Ninth Circuit (R. 58, 59), the assignments of error all being based upon the question whether the search warrant provisions of the National Prohibition Act repealed or superseded those contained in the Alaska Dry Law. (R. 54.) The validity of the search warrant and the sufficiency of the supporting affidavits were never questioned upon any other grounds. The Circuit Court of Appeals affirmed the District Court's decree, the court holding that while "the affidavits were sufficient in their statement of facts to justify (sic) the terms of the Alaska Prohibition Act and to justify the issuance of the search warrant," Congress intended when it adopted the National Prohibition Act that the pro-

visions contained therein for the search of private dwellings should occupy the ground fully and to the exclusion of local laws such as the Alaska Dry Law. (R. 69.)

STATUTES INVOLVED

The National Prohibition Act of October 28, 1919 (c. 85, 41 Stat. 305), and the Act supplemental thereto (Act of November 23, 1921, c. 134, 42 Stat. 222) contain the following provisions respecting repeals.

Section 35, Title II, of the National Prohibition Act:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Section 5 of the Supplemental Act:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; * * *.

Section 17 of the Alaska Dry Law (Act of February 14, 1917, c. 53, 39 Stat. 903), relating to search warrants, provides:

That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by *manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor*, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; and said warrant shall be placed in the hands of the marshal, his deputy, or any town marshal or policeman in any town in which the room, house, building, or other place above referred to is located, commanding him to at once thoroughly search said described room, house, building, or other place, and the appurtenances thereof; and if any such be found, to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal-

> revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time covering the alleged offense, and forthwith report all the facts to the district attorney or his deputy, and such alcoholic liquor or the means for dispensing same, * * *. (Italics ours.)

Section 25, Title II, of the National Prohibition Act, provides:

> No search warrant shall issue *to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor*, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. (Italics ours.)

SPECIFICATIONS OF ERROR TO BE URGED

I. The Circuit Court of Appeals erred in holding that the search warrant provisions of the Alaska Dry Law, in so far as they relate to private dwellings, have been repealed and superseded by those of the National Prohibition Act.

II. The Circuit Court of Appeals erred in sustaining the District Court's ruling that the search warrant which was issued in accordance with the provisions of the Alaska Dry Law was void, and that any evidence obtained as a result thereof should be excluded.

III. The Circuit Court of Appeals erred in affirming the District Court's decree dismissing the suit.

REASONS FOR GRANTING THE WRIT

I. This case presents a question of importance to the United States, namely, whether the search-warrant provisions of the Alaska Dry Law and the Alaska Code are available to it in the enforcement of prohibition in Alaska.

II. The failure of the Circuit Court of Appeals in this case to follow prior decisions of that court has caused considerable uncertainty as to the proper procedure to be followed in prohibition matters in Alaska. This uncertainty is bound to result in continuous controversy, and a decision of this Court is necessary for the guidance of the courts below and the officers charged with the administration and enforcement of the Alaska Dry Law.

III. If the decision of the court below is allowed to stand it will not only deprive the Government of one of the most effective means for law enforcement in Alaska but will render many provisions of the Alaska Dry Law unenforceable and to that extent defeat the plain purposes of the Act.

IV. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court on the subject of repeal of a prior special statute by a later general one. (See *Kennedy* v. *United States*, 265 U. S. 344; *Washington* v. *Miller*, 235 U. S. 422; *Rodgers* v. *United States*, 185 U. S. 83.)

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1927.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 15, 1926. (R. 71.) The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

THE SEARCH WARRANT PROVISIONS OF THE ALASKA DRY LAW WERE NOT REPEALED OR SUPERSEDED BY THE NATIONAL PROHIBITION ACT

In *Abbate* v. *United States*, 270 Fed. 735, the court below held that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act, was not repealed by the latter act. The court pointed out that in passing the National

Prohibition Act Congress was adopting general legislation for the whole United States to carry out the provisions of the Eighteenth Amendment, while in enacting the Alaska prohibition statute it was legislating solely for that territory and adopting provisions peculiarly applicable thereto. There can be no doubt, the court said, that the National Prohibition Act takes the place of prior general statutes of the United States so far as they are inconsistent therewith, but it does not follow that it repeals the express provisions of the local statute adopted expressly for Alaska. The court further held it is well settled that a law of a territory will subsist and be enforced concurrently with a general law applicable throughout the United States on the same subject. The court then quoted the following well-known rule of statutory construction (p. 736):

> "A general act repealing all acts that are inconsistent with its provisions will usually be construed to refer to general statutes alone and not to include special or local laws.
> * * *
>
> "The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act, especially where both laws were enacted at the same time or are substantially con-

> temporaneous. * * * Hence it is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute."

This rule has been followed by this Court where similar questions have arisen:

> *Kennedy* v. *United States*, 265 U. S. 344.
> *Washington* v. *Miller*, 235 U. S. 422.
> *Rodgers* v. *United States*, 185 U. S. 83.

The decision reached in the *Abbate case* was later affirmed by the court below in the following cases:

> *Koppitz* v. *United States*, 272 Fed. 96.
> *Simpson* v. *United States*, 290 Fed. 963.
> *Peterson* v. *United States*, 297 Fed. 1000.

In the last case the court said (p. 1001):

> The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail.
>
> The fact that the penalties may be different for some of the offenses defined in the two acts does not affect the validity of the Alaska statute * * *.

When the court came to consider the instant case, however, it refused to follow its prior decisions on the subject. It completely discarded the rule of statutory construction adopted in previous cases and held that the purpose of Congress in enacting the search-warrant provisions of the Na-

tional Prohibition Act was to cover that ground fully and to the exclusion of local laws on the subject, and that by its action Congress impressed a limitation on the right to search a dwelling which is available to the residents of Alaska equally with those in other portions of the United States. In reaching this conclusion the court said that under neither Act may intoxicating liquor be possessed without a permit. So, the court reasoned, it will not do to accept the argument that the search-warrant provisions of the National Prohibition Act have to do with conditions different and inapplicable to the enforcement of the Alaska Dry Law. Here is where the court erred.

Not only may liquor be possessed under the National Prohibition Act in a private dwelling for certain purposes without a permit, which is not permissible under the Alaska statute, as will be pointed out later, but conditions in Alaska are different and the search-warrant provisions of the National Prohibition Act are wholly inadequate to the enforcement of the Alaska Dry Law, specially enacted to deal with those conditions. The purpose of the Alaska statute and the distinction between the two Acts are well set forth by the court below in the *Abbate case, supra* (p. 736):

> Congress enacted the Bone Dry Law for Alaska, and 20 months later it enacted the National Prohibition Act. In enacting the latter Congress was adopting legislation for the whole United States to carry out the pro-

visions of the Eighteenth Amendment. In enacting the Bone Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by legislation enacted on July 27, 1868, for the prevention of the importation and sale of intoxicating liquors in Alaska, the population of which was largely composed of Indians, and it was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917. That act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offense, than do the provisions of the National Prohibition Act.

That Congress intended to enact a statute dealing with conditions peculiar to Alaska is clearly shown by the drastic provisions in the statute itself, as compared with those in the National Prohibition Act adopted for the country in general, and by the debates in Congress on the bill, where it was explained that its provisions, while somewhat drastic, were intended to afford genuine prohibition so as to protect the inhabitants of Alaska, a large part of whom consisted of Indians. (Cong. Rec., Vol. 54, Pt. 3, 2520–2524.)

Having so recently considered conditions in Alaska and adopted legislation deemed suitable for that Territory, it is not likely that Congress, when it came to adopt the National Prohibition Act,

would have changed its views in regard to the need for the drastic provisions which it had inserted in the Alaska law. Section 17 of the latter act is broader in scope than Section 25 of the National Prohibition Act. It permits the issuance of a warrant for the search of a dwelling or other building upon a charge of "manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor," while Section 25 of the National Prohibition Act provides for the search of a private dwelling only upon evidence of sale. Obviously, the purpose of inserting more liberal search-warrant provisions in the Alaska Act was to afford effective means for enforcing the drastic provisions of that act. And since Section 17 is broader than Section 25 there is no conflict between the two provisions within the meaning of Section 35, Title II, of the National Prohibition Act and Section 5 of the Supplemental Act, and therefore no ground for holding that by the later enactment Congress intended to impress a limitation upon the right to search a private dwelling in Alaska.

As pointed out above, the court's decision was partly based on the erroneous assumption that under neither Act may intoxicating liquor be possessed without a permit. Section 33, Title II, of the National Prohibition Act provides that one may possess liquors without a permit in his private

dwelling so long as such liquors are for use only for the personal consumption of the owner, his family, and bona fide guests. Such liquors, however, may not be sold. It is readily apparent therefore why Congress limited a warrant for the search of a private dwelling under the National Prohibition Act to evidence of sale. But no such provision is found in the Alaska statute. Under it no liquors may be possessed in a private dwelling or elsewhere without a permit. Necessarily, in order that all the provisions of that statute could be enforced, the search-warrant provisions had to be made as broad as the acts forbidden. This Congress attempted to do in Section 17. It made no distinction between private dwellings and other buildings. To hold that said section has been repealed and thus restrict warrants for the search of dwellings to evidence of sale only would leave many offenses unpunished. It would defeat many of the drastic provisions of the Act. The manufacturing, storage, use, and exchange of alcoholic liquors in a private dwelling, although forbidden by the Act, could be carried on with impunity and no search warrant could issue to secure evidence on which to base a prosecution unless there was also a sale. Obviously this can not have been the intent of Congress. It is not in keeping with the purpose to provide a genuine prohibition statute for Alaska. Congress did not intend

by the later statute to legalize acts which it had previously forbidden.

We see no reason for holding that Section 25, Title II, of the National Prohibition Act, which provides for searches and seizures under that Act, is inconsistent with or that it repeals Section 17 of the Alaska Dry Law. Search warrants issued under the latter statute sufficiently safeguard the rights of the accused, since they can not be issued, except upon probable cause, the same as under the National Prohibition Act. (Secs. 2488, et seq., Comp. Laws of Alaska, 1913.) If the Alaska law and the penalties provided thereunder are not repealed, as the court below had previously held, certainly it would seem that the search-warrant provisions and the procedure thereunder are not repealed.

We think that the Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and that the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does the state acts. It apparently was the intention of Congress that both Acts should remain in full effect, one a special act for Alaska and the other a general law for the United States as well as for the Territory of Alaska.

The cases of *Vigliotti* v. *Commonwealth of Pennsylvania*, 258 U. S. 403, and *Kennedy* v. *United States*, 265 U. S. 344, are in point. In the former this Court held that a state law of May 13, 1887,

known as the Brooks Law, which prohibits the sale of spirituous liquor without a license, was not at variance with but rather in aid of the provisions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. In the latter it was held that the portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian country an offense and fixed its punishment, was not repealed, superseded, or modified by the National Prohibition Act.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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JANUARY, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 175

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLE BERKENESS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69) is reported in 16 F. (2d) 115.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 15, 1926. (R. 70.) Petition for certiorari was filed January 31, 1927, and granted April 18, 1927 (R. 71) under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Has Section 17 of the Alaska Dry Law, in so far as it relates to the issuance of search warrants for private dwellings on proof that liquor is being kept therein, but without requiring proof of sales, been repealed or superseded by the search warrant provisions of Section 25, Title II, of the National Prohibition Act, which require that no dwelling shall be searched unless there is proof of sales? In other words, are the search warrant provisions of the Alaska Dry Law and the Alaska Code available to the Government in the enforcement of prohibition in Alaska?

STATUTES INVOLVED

The principal statutes involved are set forth in an appendix to this brief.

STATEMENT

This suit was brought May 6, 1925 (R. 6), in the District Court for the Fourth Division of Alaska, to abate a common and public nuisance maintained in respondent's dwelling at Fairbanks, Alaska, in violation of Sections 19 and 20 of the Act of February 14, 1917, c. 53, 39 Stat. 903, 907 (U. S. C., Title 48, Secs. 280, 281), commonly known as the Alaska Bone Dry Law.

The suit was based on information obtained under a search warrant issued May 5, 1925, by the United States Commissioner for the Fairbanks Precinct for the search of respondent's cabin located in the Town of Fairbanks, and for the seizure

of any liquor found therein. (R. 24.) The warrant was based upon three affidavits made by a deputy United States Marshal, and two prohibition agents, the affidavits alleging that intoxicating liquor was kept and stored in the building. (R. 17–22.) Under the terms of the Alaska Bone Dry law it is unlawful to keep intoxicating liquor in a dwelling, although not for sale, and under Section 17 of that law (unless it was repealed by the National Prohibition Act) a search warrant may issue to search a dwelling on proof that liquor is being kept therein, and without any proof of sales. The warrant was served by the deputy Marshal and a large quantity of intoxicating liquor and paraphernalia for its manufacture were seized. (R. 27–28.)

At the trial the Government offered testimony relating to the search and seizure and sought to introduce in evidence the search warrant, the supporting affidavits, and the Marshal's return thereon, with a view to showing that respondent had in his possession in the cabin 99 bottles of beer, 1 fifty-gallon barrel of wine, 1 fifty-gallon barrel of beer mash in the process of being manufactured, 1 eight-gallon still complete, together with other contraband property used in the manufacture and possession of intoxicating liquor, as shown by the inventory attached to the search warrant (R. 27–28), and that at the time of the seizure, and for a long period prior thereto, he had stored in the building and was then engaged in the manufacture therein

of intoxicating liquor in violation of the provisions of the Alaska Dry Law.

Respondent objected to the introduction of the evidence and submitted a petition for its suppression, which had previously been filed in the criminal case (R. 37), upon the grounds that the building in question was occupied by him as his residence; and, inasmuch as the search warrant and supporting affidavits did not show that the building was being used as a place for the sale of intoxicating liquor, the warrant was void (R. 19, 32, 39, 40).

The affidavits, the search warrant, and the complaint in the suit were all prepared and filed under the provisions of the Alaska Dry Law, and it was the Government's contention that the warrant was valid because under the local law it was unnecessary to allege or show in the affidavits for the warrant that the building described was being used for the sale of intoxicating liquor. (R. 51.)

The petition for the suppression of evidence was granted, the evidence offered by the Government excluded, and the suit dismissed. (R. 11.) The Government appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 58, 59), the assignments of error all being based upon the proposition that the search warrant provisions of the National Prohibition Act had not repealed or superseded those contained in the Alaska Dry Law (R. 54). The validity of the search warrant and the sufficiency of the supporting affidavits were never questioned upon any other ground. The Circuit Court

of Appeals affirmed the District Court's decree, the court holding that while "the affidavits were sufficient in their statement of facts to justify (sic) the terms of the Alaska prohibition act and to justify the issuance of the search warrant," Congress intended, when it enacted the National Prohibition Act, that the provisions contained therein for the search of private dwellings should occupy the ground fully and to the exclusion of local laws, such as the Alaska Dry Law. (R. 69, 70.)

The Government thereupon applied to this Court for a writ of certiorari, setting forth as grounds therefor that the failure of the court below to follow its prior decisions upon the subject had resulted in uncertainty as to the proper procedure to be followed in prohibition matters in Alaska, and that if the decision were allowed to stand it would not only deprive the Government of one of the most effective means of law enforcement in Alaska but would render many provisions of the Alaska Dry Law unenforceable and to that extent defeat the plain purposes of the Act. The writ was granted April 18, 1927.

SUMMARY OF ARGUMENT

The court below erred in failing to follow the rule of statutory construction laid down in its prior decisions holding that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act was not repealed by the latter Act.

The National Prohibition Act contains no provisions expressly repealing the Alaska Dry Law, and repeals by implication are not favored. It repeals only such prior statutes as are inconsistent with its own provisions. As between the later enacted statute, the National Prohibition Act, and the prior specially enacted Dry Law for Alaska, no irreconcilable conflict or incompatibility can be found. Both may stand—one as a general law for the United States and the other as a special statute for Alaska. The Alaska Dry Law being a special statute, the presumption is, in the absence of an express repeal, that it was intended to remain in force as an exception to the later general provision of the National Prohibition Act.

In enacting the Alaska Dry Law, Congress was pursuing its policy of prohibition in the Indian country. Such statutes have always been regarded as special legislation, passed for a specific purpose. The Alaska Dry Law contains severer penalties and more drastic provisions than the National Prohibition Act. These were inserted to insure genuine prohibition and to afford protection to the Indians and white settlers of Alaska. In order that the purposes of the Act might be fully carried out, the search-warrant provisions had to be made as broad as the acts forbidden. With these more drastic provisions and the peculiar conditions of Alaska the restricted search-warrant provisions of the National Prohibition Act are wholly inadequate to

deal. There is therefore no inconsistency between the two statutes and no implied repeal.

Under the Alaska Dry Law and the Alaska Code no search warrant may issue except upon probable cause, the same as under the National Prohibition Act. Respondent was therefore deprived of no constitutional rights by the procedure in this case.

The Alaska Dry Law remains in force just as do the prohibition laws of the States, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does State laws. Congress evidently intended that both Acts should remain in full effect—one a special Act for Alaska, the other a general law for the United States as well as for the Territory of Alaska.

ARGUMENT

THE SEARCH WARRANT PROVISIONS OF THE ALASKA DRY LAW AND THE ALASKA CODE WERE NOT REPEALED OR SUPERSEDED BY THE NATIONAL PROHIBITION ACT

In *Abbate* v. *United States*, 270 Fed. 735, the court below held that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act, was not repealed by the latter Act. The court pointed out that in passing the National Prohibition Act Congress was adopting general legislation for the whole United States to carry out the provisions of the Eighteenth Amendment, while in enacting the Alaska prohibition statute it was legislating solely for that territory and adopting provisions

peculiarly applicable thereto. There can be no doubt, the court said, that the National Prohibition Act takes the place of prior general statutes of the United States so far as they are inconsistent therewith, but it does not follow that it repeals the express provisions of the local statute adopted expressly for Alaska. The court further held it is well settled that a law of a territory will subsist and be enforced concurrently with a general law applicable throughout the United States on the same subject. While the court did not make a ruling on search warrants, because that question was not before it, the opinion quoted the following well-known rule of statutory construction (p. 736):

> A general act repealing all acts that are inconsistent with its provisions will usually be construed to refer to general statutes alone and not to include special or local laws. * * *
>
> The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act, especially where both laws were enacted at the same time or are substantially contemporaneous. * * * Hence it is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute. * * *

The decision in the *Abbate case* was later affirmed by the court below in the following cases:

> *Koppitz* v. *United States*, 272 Fed. 96.
> *Simpson* v. *United States*, 290 Fed. 963.
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In the last case the court said (p. 1001):

> The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail.
>
> The fact that the penalties may be different for some of the offenses defined in the two acts does not affect the validity of the Alaska statute * * *.

When the court came to consider the instant case, however, it refused to follow its prior decisions on the subject. It completely discarded the rule of statutory construction adopted in previous cases and held that the purpose of Congress in enacting the search-warrant provisions of the National Prohibition Act was to cover that ground fully and to the exclusion of local laws on the subject, and that by its action Congress impressed a limitation on the right to search a dwelling which is available to the residents of Alaska equally with those in other portions of the United States.

The error of the court in reaching this conclusion may be demonstrated, we believe, by a consideration of the following propositions: (*a*) Special legislation is not repealed by general law; (*b*) the Alaska statute was enacted to deal with conditions

peculiar to that country, and (*c*) the constitutional rights of respondent were fully protected under the search warrant provisions of the Alaska Code.

(A) THE ALASKA DRY LAW BEING A SPECIAL STATUTE, THE PRESUMPTION IS THAT IT WAS INTENDED TO REMAIN IN FORCE AS AN EXCEPTION TO THE LATER GENERAL PROVISIONS OF THE NATIONAL PROHIBITION ACT

The National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305, is concededly a general statute of the United States. It contains no provisions expressly repealing the Alaska Law, and it is settled that repeals by implication are not favored. Such provisions as the National Prohibition Act does contain respecting repeals make against rather than for implied repeals. Section 35, Title II (U. S. C., Title 27, Sec. 52), provides in part:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Section 19, Title III (U. S. C., Title 27, Sec. 89), contains similar provisions respecting alcohol. And Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), reads in part:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of

> such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act. * * *

The language of this Court in considering a statute containing a similar provision is applicable here. In *Henderson's Tobacco,* 11 Wall. 652, the question was whether the Act of July 20, 1868, imposing taxes on distilled spirits and tobacco, repealed the proviso to the 25th Section of the Internal Revenue Act of March 2, 1867, relied on by the claimants, which limited to twenty days the time for commencing proceedings to enforce forfeitures. The Act of 1868 contained a provision "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." In overruling the contention of the Government that the proviso relied on by the claimants was repealed by the Act of 1868, this Court said (pp. 656-657):

> If this is so, it was a repeal by implication only. That act contains no words expressly repealing either the act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause, which it does contain, indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject-matter. The 105th section enacts, "that all acts and parts of acts inconsistent with the provisions of this act are hereby

repealed." This is an express limitation of the extent to which it was intended former acts should cease to be operative, namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In the *United States* v. *Tynen* [11 Wall. 88, 92], it was said by Mr. Justice Field, that "when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more

> than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.

In the absence of specific provisions for repeal, a general statute will not nullify merely on the theory of repugnancy a prior existing one which is special, local, or particular, or which is limited in its application. Sutherland, Statutory Construction, 2nd Ed. (Lewis, 1904), Sec. 274.

In *State* v. *Stoll*, 17 Wall. 425, 431, this Court said:

> To justify this court in holding that the act passed in that year repealed or modified the sixteenth section of the charter of the bank in question, it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand.

And again (p. 436):

> The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case.

In *Rodgers* v. *United States*, 185 U. S. 83, 87, it was said:

> It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

In *Washington* v. *Miller*, 235 U. S. 422, this Court had under consideration the question of whether a subsequently enacted general statute repealed special provisions of a prior Act confining the descent and distribution of Creek land to citizens of the Creek Nation. After setting forth the subsequently enacted statute, this Court observed (pp. 427–428):

> No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any quali-

fication or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, Section 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87–89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

Certainly as between the later enacted statute, the National Prohibition Act, and the prior specially enacted Dry Law for Alaska, no irreconcilable conflict or incompatibility can be found. Both may stand—one as a general law for the United States and the other as a special statute for Alaska. Any seeming incompatibility that may result from the differences in the penalties and search-warrant provisions, or other apparent inconsistencies, between the two Acts at once disappears when full recognition is given to the purpose and intent underlying each statute. Especially is this so when it is realized that the Alaska statute was enacted to cope with peculiar local conditions, with which the milder and more liberal provisions of the National Prohibition Act, as will be pointed out later, are wholly inadequate to deal. The purpose of inserting more drastic provisions in the Alaska law was to lessen the unusual dangers arising in such a vast unpeopled territory from a large unrestricted Indian population coming into even ordinary contact with caches of intoxicating liquor. Congress has long recognized the inflammable character of the Indian when liquor is left within his reach. The need for protecting the Indians as well as the white settlers of Alaska was as great when the National Prohibition Act was adopted, and is as necessary to-day, as when the Alaska Dry Law was enacted. In passing this law, Congress was merely pursuing a long-established governmental policy of prohibiting traffic in ardent spirits in the Indian country

among a primitive people for whose welfare, protection, and development the United States Government was responsible as guardian. Such statutes have always been regarded as special legislation, passed for a specific purpose, and restricted to a comparatively narrow field of operation. They are fundamentally unchanged by fluctuations in the policy or laws relating to the country in general. The Alaska statute is based on the theory of wardship and protection. The National Prohibition Act is founded on a distinctly moral and economic basis. Instead of being in irreconcilable conflict each statute is based on a separate and distinct governmental policy, and in order fully to carry out that policy it is necessary that both statutes be preserved.

B. THE ALASKA DRY LAW WAS ENACTED TO DEAL WITH CONDITIONS PECULIAR TO ALASKA

In reaching its conclusion, the court below said that under neither Act may intoxicating liquor be possessed without a permit. So, the court reasoned, it will not do to accept the argument that the search-warrant provisions of the National Prohibition Act have to do with conditions different and inapplicable to the enforcement of the Alaska Dry Law. In this, we believe, the court erred.

Not only may liquor be possessed under the National Prohibition Act in a private dwelling for certain purposes without a permit, which is not permissible under the Alaska statute, as will be pointed out later, but conditions in Alaska are dif-

ferent and the search-warrant provisions of the National Prohibition Act are wholly inadequate to the enforcement of the Alaska Dry Law, specially enacted to deal with those conditions. The purpose of the Alaska statute and the distinction between the two were well set forth by the court below in the *Abbate case*. Congress enacted the Bone Dry Law for Alaska and two years later it passed the National Prohibition Act. In enacting the latter, Congress was adopting legislation for the whole United States to carry out the provisions of the Eighteenth Amendment. In enacting the Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by the Act of July 27, 1868, c. 273, 15 Stat. 240, 241, Sec. 4 (Sec. 1955 R. S.), which empowered the President to prohibit the importation and use of distilled spirits into and within the Territory of Alaska, the population of which was then largely composed of Indians. That policy was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917.

By the Act of March 3, 1873, c. 227, 17 Stat. 510, 539, the provisions of the Act of June 30, 1834, c. 161, 4 Stat. 729, defining the boundaries of the Indian country were extended to Alaska. Whether Alaska is still Indian country within the definitions laid down by this Court is immaterial, because a large part of the population is still composed of

Indians and the sale of intoxicants to Indians there has been continuously prohibited. Later by the Act of May 17, 1884, c. 53, 23 Stat. 24, 28, Sec. 14, providing a civil government for Alaska, the importation, manufacture, and sale of intoxicating liquor in Alaska, except for medicinal, mechanical, and scientific purposes, were prohibited. While the latter provisions and those of Section 4 of the Act of July 27, 1868, *supra*, were repealed when the system of licenses was established for the sale of liquor in Alaska, the sale of liquor to Indians under the license system was forbidden. Act of March 3, 1899, c. 429, 30 Stat. 1253, 1338, Sec. 466, Title II; Sec. 142, Title I, amended February 6, 1909, c. 80, 35 Stat. 600, 603, Sec. 9 (Alaska Code, 1913, Secs. 2575, 2022).

Evidently the people of Alaska became dissatisfied with the liquor situation as it existed under the license system. That system afforded no protection against the traffic in liquor among the Indians by the bootlegger. Because of the limitations, however, which the Act of August 24, 1912, c. 387, 37 Stat. 512, 514, Sec. 9 (U. S. C., Title 48, Sec. 77), placed upon the power of the legislative assembly with respect to the control of the liquor traffic, it was deemed doubtful whether that body could fully deal with the subject. So the assembly passed an Act in 1915 submitting to the voters of Alaska the question whether they desired prohibition in the Territory after January 1, 1918. The vote was car-

ried by a large majority. House Report No. 1357, 64th Cong., 2nd Sess. It was in pursuance of this vote that the so-called Alaska Dry Law was passed.

That Act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offenses, than do the provisions of the National Prohibition Act. For instance, the penalty provided for manufacturing, selling, transporting, or possessing under the Alaska Act (Sec. 1) is $1,000 fine or a year's imprisonment, or both. Under the National Prohibition Act (Sec. 29, Title II) the penalty for manufacturing or selling, for a first offense, is $1,000 or six months' imprisonment, while for transporting or possessing, for a first offense, it is only $500 fine.

That Congress intended to enact a statute dealing with conditions peculiar to Alaska is shown not only by the more drastic provisions and the severer penalties contained in the Alaska Act, but also by the debates in Congress on the bill, where it was explained that its provisions, while somewhat drastic, were intended to afford genuine prohibition so as to protect the inhabitants of that country, a large part of whom consisted of Indians. (Cong. Rec., Vol. 54, pt. 3, pp. 2519-2524.) Mr. Wickersham, delegate from Alaska and author of the bill, stated on the floor of the House that the bill was drawn in response to a vote of the people of Alaska for dry legislation; that there were about 50,000 white people and from 25,000 to 30,000 Indians in

Alaska; that bootleggers were selling liquor throughout the Territory; and that if even a small quantity of liquor were permitted on one's person or in his cabin to be traded off to an Indian or white person, the bill might as well not be passed.

Representative Houston, who reported the bill from the Committee on the Territories, explained the purpose of the bill and the Alaskan situation as follows (Cong. Rec., *supra*, p. 2520):

> It is a bill to prevent the manufacture and sale of intoxicating liquors in the Territory of Alaska. I believe that this bill will accomplish that purpose. I believe it will prevent the manufacture and sale, and that is a very important thing for that Territory. Its provisions may be considered drastic somewhat, but they are complete and ample to carry out the purposes of real and genuine prohibition. * * *
>
> A very large number of the inhabitants of the Territory of Alaska are Indians, almost half of them—not half now, but up to two or three years ago about half—a people that it was thought needed the benefit of prohibitory laws more especially than did the white people, just as it was considered by this Government and by Congress that the Indians who lived in the Indian Territory needed drastic provisions and stricter regulations to prevent them from having liquor, and Congress did prevent liquor going in there. These people are up there and they are at the mercy of the liquor seller, including the blind tiger and the wildcatter, and

> this bill seeks to so fix it and safeguard it that these methods shall cease, so that the Indians can not be victimized and wronged as they have been to such a great extent by those who for the mere love of money and the profit they can make have been willing to make brutes and beasts of the native Indians for the lucre they got out of it.

Having so recently considered conditions in Alaska and adopted legislation deemed suitable for that Territory, it is not likely that Congress, when it came to adopt the National Prohibition Act, would have changed its views in regard to the need for the drastic provisions which it had inserted in the Alaska law. Section 17 of the latter Act is broader in scope than Section 25, Title II, of the National Prohibition Act. It permits the issuance of a warrant for the search of a dwelling or other building upon a charge of "manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor," while Section 25 of the National Prohibition Act provides for the search of a private dwelling only upon evidence of sale. Obviously the purpose of inserting broader search-warrant provisions in the Alaska Act was to afford effective means for enforcing the drastic provisions of that Act. And since Section 17 is broader than Section 25 there is no conflict between the two provisions within the meaning of Section 35, Title II, of the

National Prohibition Act and Section 5 of the Supplemental Act, and therefore no ground for holding that by the later enactment of Section 25 Congress intended to impress a limitation upon the right to search a private dwelling in Alaska.

As pointed out above, the court's decision was partly based upon the erroneous assumption that under neither Act may intoxicating liquor be possessed without a permit. Section 33, Title II (U. S. C., Title 27, Sec. 50), of the National Prohibition Act provides that one may possess liquors without a permit in his private dwelling so long as such liquors are for use only for the personal consumption of the owner, his family, and bona fide guests. Such liquors, however, may not be sold. It is readily apparent therefore why Congress limited a warrant for the search of a private dwelling under the National Prohibition Act to evidence of sale. But no such provision is found in the Alaska statute. Under it no liquors may be possessed in a private dwelling or elsewhere for any purpose without a permit. Necessarily, in order that all the provisions of that statute could be enforced, the search-warrant provisions had to be made as broad as the acts forbidden. This Congress attempted to do in Section 17. It made no distinction between private dwellings and other buildings. To hold that said section has been repealed and thus restrict warrants for the search of dwellings to evidence of sale only would leave many offenses unpunished.

Evidence of sale is, of course, harder to obtain and not as readily discoverable as the odor arising from and the paraphernalia used in the manufacture of liquor in small cabins, where most of the manufacturing in the inland sections is carried on. Many of the drastic provisions of the Act would accordingly be defeated. The manufacturing, storage, use, and exchange of alcoholic liquors in a private dwelling, although forbidden by the Act, could be carried on with impunity and no search warrant could issue to secure evidence on which to base a prosecution unless there was also a sale. Obviously this can not have been the intent of Congress. It is not in keeping with the purpose to provide genuine prohibition for Alaska. The circumstances and conditions of this legislation make perfectly clear what Congress intended. It did not intend by the later enactment to legalize acts it had previously forbidden, or to take away from the Government any means for punishing those acts.

(C) THE CONSTITUTIONAL RIGHTS OF RESPONDENT WERE FULLY PROTECTED UNDER THE SEARCH-WARRANT PROVISIONS OF THE ALASKA CODE

At the time of the passage of the Alaska Dry Law there was in effect in Alaska a complete procedure for the issuance and service of search warrants and seizures thereunder. (Chap. 38, Title XV, Comp. Laws Alaska, 1913.) Section 17 of the Alaska Dry Law provides that if one or more per-

sons who are competent witnesses shall charge on oath or affirmation before the District Attorney that any person is violating or has violated any of the provisions of that Act, the District Attorney shall cause a warrant to be issued for the search of the "said described room, house, building, or other place, and the appurtenances thereof." Section 23 (U. S. C., Title 48, Sec. 284) provides that there shall be no property right in alcoholic liquors illegally manufactured, possessed, or stored under the Act, and that they may be searched for and seized and destroyed after a conviction. No specific provision governing the issuance of search warrants was made by the Dry Law, but it undoubtedly was intended that the procedure outlined in the Alaska Code should be followed in procuring warrants under Section 17 of the Dry Law, and it was generally so held before the enactment of the National Prohibition Act. Section 2488 of the Alaska Code provides:

> That a search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched.

This is practically the same language as that contained in Section 3, Title XI, of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 228 (U. S. C., Title 18, Sec. 613), which was incorporated into the National Prohibition Act, Section 25, Title II. It will thus be seen that under the Alaska Law no

warrant may issue for the search of a private dwelling except upon probable cause, the same as under the National Prohibition Act. The rights of the accused therefore are fully protected, since the statute carries out the intent of the Fourth Amendment and the decisions of this Court thereunder.

On the whole, we are unable to find any reason for contending that the search-warrant provisions of the National Prohibition Act are inconsistent with or that they repeal Section 17 of the Alaska Dry Law. Under the Alaska Law the possession of intoxicating liquor in a dwelling is illegal and there is no exception as under Section 33, Title II, of the National Prohibition Act. Under the Alaska Law a search warrant will issue for any building where intoxicating liquor is manufactured, stored, or possessed, and there is no restriction in regard to searches of private residences as under the National Prohibition Act. The only reason which can be offered why there is a restriction under the National Prohibition Act is because, as above pointed out, intoxicating liquor can be lawfully stored and possessed in a private dwelling under certain circumstances set forth in the National Prohibition Act. There is just as much reason for keeping the search-warrant provisions of the Alaska law in force as there was for upholding the penalty provisions in the *Abbate case*.

True, the Organic Act creating a territorial assembly for Alaska provides that the Constitution

of the United States, and all laws thereof which are not locally inapplicable, shall have the same force and effect within the Territory as elsewhere in the United States. Comp. Law of Alaska, 1913, Section 410. (U. S. C., Title 48, Sec. 23.) But this provision is incorporated in the Organic Acts of all Territories. It is simply an extension of the laws of the United States to the Territories. As pointed out by the court below in the *Abbate case*, it does not stand in the way of or affect the construction of special congressional legislation enacted solely for the Territories. In the *Abbate case* it was held that the provision of the National Prohibition Act for the punishment for selling liquor in Alaska "is wholly inapplicable" there, because Congress has provided a severer penalty for the act when committed in Alaska. If this is so, there would seem to be no reason why the search-warrant provisions of the National Prohibition Act should not be held locally inapplicable in Alaska, since Congress has provided more liberal search-warrant provisions for the detection and prosecution of crime when committed there. But whether the search-warrant provisions of the National Prohibition Act may be regarded as locally inapplicable or not, we submit that they were not intended to be exclusive or to repeal the Alaska law upon the subject.

The cases of *Vigliotti* v. *Commonwealth of Pennsylvania*, 258 U. S. 403, and *Kennedy* v. *United States*, 265 U. S. 344, are in point. In the former

this Court held that a State law of May 13, 1887, known as the Brooks Law, which prohibited the sale of spirituous liquor without a license, was not at variance with but rather in aid of the provisions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. In the latter, it was held that the portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian country an offense and fixed its punishment, was not repealed, superseded, or modified by the National Prohibition Act. This Court said (p. 345):

> The evils aimed at are those which result from liquor traffic in localities where Indians live or which they are liable to frequent. These statutes apply locally for the special purpose of keeping whiskey and other intoxicants out of the reach of Indians.

CONCLUSION

We think that the Dry Law of Alaska remains in force just as do the prohibition laws of the States, and that the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does the State Acts. It apparently was the intention of Congress that both Acts should remain in full effect—one a special Act for Alaska and the other a general law for the United States, as well as for the Territory of Alaska.

The decree of the court below should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
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MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Chief Attorney.

SEPTEMBER, 1927.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

ALASKA DRY LAW AND ALASKA CODE

Section 1 of the Alaska Dry Law (Act of February 14, 1917, c. 53, 39 Stat. 903, U. S. C., Title 48, Sec. 261) reads as follows:

> That on and after the first day of January, anno Domini nineteen hundred and eighteen, it shall be unlawful for any person, house, association, firm, company, club, or corporation, his, its, or their agents, officers, clerks, or servants, to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided.
>
> Whenever the term "liquor," "intoxicating liquor," or "intoxicating liquors" is used in this Act it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, and all malt liquors, including all alcoholic compounds classed by the United States Internal Revenue Bureau as "compound liquors": *Provided*, That this Act shall not apply to methyl or wood alcohol.

That any person or persons, or any house, company, association, club, or corporation, his, its, or their agents, officers, clerks, or servants, who shall, directly or indirectly, violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $1,000 or shall be imprisoned for a period of not more than one year, or by both such fine and imprisonment.

Section 17 (U S. C., Title 48, Sec. 278), providing for search warrants, reads:

That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; and said warrant shall be placed in the hands of the marshal, his deputy, or any town marshal or policeman in any town in which the room, house, building, or other place above referred to is located, commanding him to at once thoroughly search said described room,

house, building, or other place, and the appurtenances thereof; and if any such be found, to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal-revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time covering the alleged offense, and forthwith report all the facts to the district attorney or his deputy, and such alcoholic liquor or the means for dispensing same, or the paraphernalia of a barroom or other alcoholic liquor establishment, or any United States internal-revenue tax receipt or certificate for the sale of alcoholic liquor, effective as aforesaid, shall be prima facie evidence of the violation of the provisions of this Act.

Section 2488 of the Alaska Code (Comp. Laws of Alaska, 1913) provides:

> That a search warrant can not be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched.

Sections 19 and 20, the nuisance provisions of the Alaska Dry Law, read:

Section 19 (U. S. C., Title 48, Sec. 280):

> That all houses, boats, boathouses, buildings, clubrooms, and places of every description, including drug stores, where alcoholic liquors are manufactured, stored, sold, or vended, given away, or furnished contrary

to law, including those in which clubs, orders, or associations sell, barter, give away, distribute, or dispense intoxicating liquors to their members by any means or device whatever, as provided in this Act, shall be held, taken, and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others, in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to the penalties prescribed in section one of this Act, and judgment shall be given that such house, boat, building, or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquor contrary to law, as the court may determine.

Section 20 (U. S. C., Title 48, Sec. 281):

That any United States district attorney for the Territory of Alaska may maintain an action in equity in the name of the United States to abate and perpetually enjoin such a nuisance as defined in the preceding section. No bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not more than $500 or by imprisonment in the Federal jail for not more than six months, or both such fine and imprisonment, in the discretion of the court.

NATIONAL PROHIBITION ACT AND SUPPLEMENTAL ACT

Section 35, Title II, of the National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52), provides, with respect to repeals, as follows:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), relating to repeals, provides:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act * * *.

Section 25, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 39), the search warrant provision, reads:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so un-

lawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. * * *

Section 33, Title II, of the same Act (U. S. C., Title 27, Sec. 50), permitting possession for certain purposes, provides:

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein * * *.

Section 3 of the Supplemental Act (U. S. C., Title 27, Sec. 2) reads:

> That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands * * *.

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SUPREME COURT OF THE UNITED STATES.

No. 175.—October Term, 1927.

The United States of America, Petitioner, *vs.* Ole Berkeness.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 21, 1927.]

Mr Justice McReynolds delivered the opinion of the Court.

This proceeding was begun by the U. S. Attorney in the District Court for Alaska to enjoin and abate a nuisance said to be maintained in Berkeness' private dwelling at Fairbanks.

The complaint alleges: That on the fifth day of May, 1925, the defendant "had in his possession at and in said premises intoxicating liquor, to wit, beer and wine, and was engaged therein, in manufacturing intoxicating liquor, to wit, beer, which said liquor was kept and stored in said premises and was being manufactured therein by said defendant, in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and particularly in violation of Sections 19 and 20 of said Act. That said defendant has for a long time prior to the 5th day of May, 1925, kept and maintained said premises as a common and public nuisance, and has, during said time, kept intoxicating liquor in his possession, and stored in said premises." It was dismissed because unsupported by competent evidence.

A warrant issued May 5, 1925, by the U. S. Commissioner at Fairbanks commanded the Marshal to search the premises then occupied by Berkeness as a private dwelling for intoxicating liquors, alleged there to be kept, possessed and stored by him contrary to the Act of Congress approved February 14, 1917. The preceding affidavits did not charge the use of the dwelling for unlawful *sale* of intoxicants or for any business purpose. The trial court declared the warrant invalid and rejected all evidence

obtained thereby. This action met approval by the Circuit Court of Appeals.

An Act of Congress "To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, etc.", approved February 14, 1917, c. 53, 39 Stat. 903, provides—

> Sec. 1. That on and after the first day of January anno Domini nineteen hundred and eighteen, it shall be unlawful for any person, house, association, firm, company, club, or corporation, his, its, or their agents, officers, clerks, or servants, to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided.
>
> Sec. 13. That it shall be unlawful for any person owning, leasing, or occupying or in possession or control of any premises, building, vehicle, car, or boat to knowingly permit thereon or therein the manufacture, transportation, disposal, or the keeping of intoxicating liquor with intent to manufacture, transport, or dispose of the same in violation of the provisions of this Act.
>
> Sec. 17. That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; . . .

"Manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof

from the United States and all territory subject to the jurisdiction thereof for beverage purposes" is forbidden by the Eighteenth Amendment.

The National Prohibition Act of October 28, 1919, "To Prohibit Intoxicating Beverages, etc.", c. 85, Title II, 41 Stat. 307, provides—

> Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. . . .
>
> Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. . . .
>
> Sec. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or of any subdivision thereof or by the commissioner or his deputies or assistants.
>
> Sec. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the

court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house . . . .

Sec. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. . . . But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

Sec. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Chapter 134, "An Act Supplemental to the National Prohibition Act", approved November 23, 1921, 42 Stat. 222, declares—

Sec. 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands.

Sec. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such

provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. . . .

Sec. 6. That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

The court below held that by the legislation subsequent to the Act of February 14, 1917, Congress imposed "a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States", and we approve that conclusion.

Notwithstanding known difficulties attending enforcement of prohibition legislation, Congress was careful to declare in the National Prohibition Act that mere possession of liquor in one's home "shall not be unlawful" and to forbid procurement of evidence through warrants directing search of dwellings strictly private not alleged to be used for unlawful sale. The definite intention to protect the home was further emphasized by Section 6, Act of 1921.

It is argued that both the Act of 1917 and the later general Act are in full effect within Alaska—one a special act for that Territory, and the other a general law for the United States and all territory subject to their jurisdiction. But the emphatic declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants. Certainly no adequate reason has been suggested for withholding from those who reside in Alaska the safeguards deemed essential in all other

territory subject to the jurisdiction of the United States. The provision of the earlier special Act is hostile to the later declaration of Congress and must give way.

Our conclusion is entirely consistent with established canons of construction, stated and exemplified by *Henderson's Tobacco*, 11 Wall. 652; *State* v. *Stoll*, 17 Wall. 425, 431; *Rodgers* v. *United States*, 185 U. S. 83, 87; *Washington* v. *Miller*, 235 U. S. 422, and similar cases.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.